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DIVISION OF REVIEW

WORK MATERIALS NO. 17

TENTATIVE OUTLINES AND SUMMARIES OF STUDIES IN PROCESS

PART E: LEGAL STUDIES

PART F: CONTRIBUTORY MATERIALS

Work Materials No. 17 falls into the following parts:

Part A: Industry Studies
Part B: Labor Studies
Part C: Trade Practice Studies
Part D: Administrative Studies
Part E: Legal Studies
Part F: Contributory Materials

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C O N F I D E N T I A L

MEMORANDUM TO: SECTION HEADS December 30 1935

SUBJECT: WORK MATERIALS NO. 17

TENTATIVE OUTLINES AND SUMMARIES OF STUDIES IN PROCESS

In order that those working on one study may secure access to allied materials in other studies, these TENTATIVE OUTLINES AND SUMMARIES are made available for confidential use within the Division of Review.

Since these documents were prepared from work that is now in process, they are highly tentative. The outlines are the present operative tables of contents of the studies, but they are of course subject to change as the work progresses. The summaries are, in some cases, forecasts rather than actual summaries of developed manuscripts. Notwithstanding their tentative character, the documents will serve to indicate in some detail the subject matter of the studies now in process in the division. No one will think of these materials as "findings" or "reports" in the usual sense of those terms.

It is expected that these TENTATIVE OUTLINES AND SUMMARIES will result in many conferences, both formal and informal, among those working on the studies--to the ends that effective coordination of the studies may occur and duplication of effort will be reduced to a minimum.

L. C. Marshall
Director, Division of Review

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December, 1935.

SECTION E

LEGAL STUDIES

STUDIES OF THE LEGAL RESEARCH SECTION

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FOREWORD TO PART E

The Legal Studies Section, Division of Review, comprises three study groups, namely, Legal Research Studies, Enforcement Studies, and Legal Labor Studies. This Section was created to coordinate and develop research into important legal questions raised by the administration of the National Recovery Act and the Schechter decision. The scope of the work of each study group may be found by reference to the tables of contents and summaries to be found under the title of each group.

Attention is here called to the fact that the Legal Labor Study is being conducted in conjunction with the Labor Studies Section. The detailed Table of Contents and Summary of Findings of this Legal Labor Study is to be found in Part B.

The materials of the Legal Studies Section fall into three groups:

1. Studies of the Legal Research Section
2. Studies of the Enforcement Studies Section
3. Legal Aspect of Labor Studies

LEGAL STUDIES

LEGAL RESEARCH SECTION

Foreword

The studies of this Section are directed to the one purpose of possible utility for legislative use -- that is, to furnish legal material for whatever governmental authority may desire to avail itself of the legal research covered by them. For convenience they have been divided into two classes:

A. Studies of the constitutional powers which indicate any degree of probable legal basis for any federal legislation concerning wages, hours, child labor and fair trade practices; and,

B. Studies in other legal fields that may be useful for any such legislation.

Whether or not any legislation upon the topics of these studies should be undertaken, and if so in what form, is a matter of policy outside the scope of our consideration.

I. POWERS.

A. Commerce.

The purpose of this study is to determine the extent of regulation of the employer-employee relationship permissible under the commerce clause. (Fair trade practices as a matter of convenience constitute a separate study described below under the heading, II, A; except such possible fair trade practices as may be employed in the regulation of the employer-employee relationship.)

While this study is directed to the whole field of regulation of this relationship not adequately covered by existing legislation, the immediate and most important problem for solution is whether and to what extent wages and hours may be governed by any federal legislation, not only in transactions in or directly and substantially affecting interstate commerce, but throughout industries engaged to such a predominant extent, if not exclusively, in such commerce that their intrastate activities cannot be separated from this predominant portion and therefore require the same single regulation.

This latter question of industrial regulation subdivides into the categories of business affected with a public interest (which in turn has many degrees), and of other business.

Solutions that will be mentioned in the separate summary of findings point to the particular usefulness and necessity of the study of possible regulation as to the following limited aspects where a direct effect on interstate commerce can be actually proved.

(a) Labor unrest which may dislocate, divert or obstruct interstate commerce;

(b) The sweatshop or less than fair value for services rendered which, when reflected in the sales price of goods in interstate commerce, may prevent the sale of other interstate goods in competition in interstate markets;

(c) Or that may permit articles in interstate commerce manufactured under these sweatshop conditions to move into states which, whether by statute or local practice, have higher and fairer wage bases, and thus force the fairer manufacturers down to the lower level.

(d) If Congress should pass a statute which only becomes effective upon the adherence by a substantial number of members of industry, and which deals with regulation of wages, hours and trade practices which will promote interstate commerce as well as remove restraints, upon such adherence thereafter by a substantial number of persons in an industry in the way of a written agreement to observe the standards as to wages, hours and trade practices approved by this statute, may Congress by such adherence acquire jurisdiction over these matters and prevent, through proper administrative action and by some form of cease and desist order, interference with the operation of such agreements on the part of the minority not so adhering?

This study -- the commerce power -- may prove the most useful undertaken by this Section.

Its particular utility lies in the fact that while there appear to be other legally possible and practicable methods of regulation, such as those under the taxing and spending and under the treaty power, nevertheless the commerce power, if available and to the extent constitutionally legal, offers the most direct approach to any desired regulation. As the study progresses, its potential value stands out more clearly, and warrants the fullest development that time and personnel permit.

B. Post Offices and Post Roads.

The purpose of this study is to determine how far, if at all, the power given to Congress over post offices and post roads may be employed in any feature of industrial regulation.

It may prove of some use for filling one or more gaps left by the other powers in the matter of federal regulation, if desired at any time, of industries employing the facilities of either post offices or post roads.

C. Tariff Power.

This study concerns "the possibility of variations in tariff rates to secure proper standards of wages and hours".

The possibility of employing the tariff power by way of flexible tariff rates -- since protective tariffs have been largely enacted and supported on the plea of securing American labor against the low standards of living under which foreign labor exists, -- indicates its possible utility only as an auxiliary scheme of regulation. It is limited by the difficulty of guarding those who maintain proper standards, since the results of tariff variations react against all subject to such tariffs, whether or not maintaining fair standards.

D. Taxing and Spending Powers.

The purpose of this study has been to determine the possibility and limits of and the conditions upon the use of the taxing and spending powers of Congress to promote observance of proper standards set up by federal legislation in wages, hours, child labor and fair trade practices.

The results of the study indicate that these powers, particularly the spending power, may be of utility toward these ends, provided that any appropriate legislation under the taxing power be confined to a bill or bills separate from and without reference to, any bills providing for the exercise of the spending power. It would appear also that the taxing power alone may be of some usefulness.

Conditional grants, however, could extend existing gains in some states into all states as to those regulations of hours, and abolition of child labor in hazardous occupations as have been sustained by the Supreme Court. It would also appear that conditional grants might be legally employed by Congress to induce the states to enact legislation providing maximum hours with overtime as to certain categories of labor, and minimum wages for women and minors.

E. Treaty.

This study has been directed to the investigation of the degree to which the treaty power might be used for general or particular industry regulation, particularly in the matter of wages, hours and child labor by adherence to the labor conventions re wages and hours now in effect at Geneva or by mutual pacts with foreign nations under which each would undertake to carry out provisions for such regulation through appropriate legislation (if legislation were required to carry out the terms of the treaty).

The results of this research have proven especially valuable as fairly assuring the legal use of this power in the

matter of hour regulation and possibly also of child labor, with a question still remaining as to the extent of wage regulation. The political objections may limit its utility to treatment of only a particular industry by treaty (as opposed to adherence to the labor conventions) with another country, when that industry is suffering from serious foreign competition.

F. War Power.

This study has been undertaken to determine whether or not the war power can support a federal law prohibiting child labor.

Its potential utility lies in the fact that no other constitutional power has appeared definitely capable of supporting child labor legislation, so far as revealed by the present stage of the several studies (passing for the moment the possibility of indirect legislation through the taxing and spending power). But since the war power is exclusively federal and carries with it its own appropriate police power, all the objections hitherto fatal to previous statutory attempts at such regulation appear likely to be overcome in any legislation toward this end under this particular power, if the factual basis can be adequately supported.

II. OTHER STUDIES.

A. Anti-Trust and Fair Trade Practices.

This study does not pretend to cover the large field indicated by its title, but is limited to the investigation of the more important so-called fair trade practices which, without violating the principles of the anti-trust acts, may be the subject of appropriate legislation for the safe-guarding both of industry and the consumer.

It is closely linked with the economic studies along the same lines, and would seem to be especially useful towards legislation supplementing the present so-called anti-trust acts and perfecting their application, by filling the gaps that judicial interpretation has shown to exist, and indicating the necessary legal standards.

B. Delegation of Power.

This study was undertaken to determine not only the extent to which the legislative power required for the administration of any new recovery legislation might constitutionally be delegated, but the so-called standards or primary principles or lines of policy required to render any such delegation legally sufficient.

Its utility lies in the indispensable necessity of proper standards in any legislation that delegates any portion of the

legislative power, or of power in the nature of legislative authority, to any person or body; since legislation, otherwise useful, may go into the discard, perhaps after months or years of operation, for lack of standards meeting constitutional requirements. (As a separate study, however, beyond establishing first principles, the subject is perhaps best considered in connection with any particular legislation that may from time to time be suggested.)

C. Due Process.

The research upon this topic may be characterized, so far as concerns continuance of the study as a separate title beyond the initial stage, in much the same manner as the preceding (Delegation of Power). It is devoted to the determination of how far the due process clause may restrict legislation for the regulation of wages, hours, child labor and fair trade practices generally, including any cognate matters of industrial governance.

Its utility will be evident upon review of the many attempts at wage and hour regulation that have hitherto been held invalid because repugnant to the due process clause.

D. Government Contract Provisions as a Means of Industrial Regulation.

The title of this study indicates its purpose -- the legality of employing contracts which the government may hereafter make with members of industry, as vehicles of regulation of hours, wages, child labor or fair trade practices, to be accomplished where desirable through provisions in such contracts that will operate as conditions not merely on the submission of bids or entry into any such contractual obligation, but on the right to carry the contract beyond any stage where the required conditions have not been fulfilled.

The study so far indicates feasible and legal methods of such enforcement within the limited area of the government contract field, and is so far useful.

E. State Recovery Legislation.

This study has probed the defects in previous state legislation enacted either in aid of the National Industrial Recovery Administration or independently, and the conditions under which the several states could enact such legislation consistent with the Federal Constitution and generally with their own.

Its particular utility lies in the exposition of the extent to which the several states may go in supporting federal legislation of any of the types of regulation mentioned in the studies set forth in this memorandum, and in the demonstration that this extent may be both considerable and useful.

George W. Kretzinger, Jr.

LEGAL RESEARCH SECTION

THE COMMERCE CLAUSE

(Employer-Employee Relationship)

George W. Kretzinger, Jr.

(Revised)

TABLE OF CONTENTS AND SUMMARY OF PRELIMINARY FINDINGS

LEGAL RESEARCH SECTION

THE COMMERCE CLAUSE

Table of Contents

The numbering and order of this Table do not correspond with those of the Summary since the Table covers the study in the order of its development, while the Summary merely gives the synthesized findings (tentative) gathered from many different factors of the study blended into one.

SUMMARY

INTRODUCTION

I. General conditions affecting the right of Congress to Regulate Commerce.
   A. Movement, or its equivalent, across state borders as the basis for federal control.
      1. The "flow" or "stream of interstate commerce", subject to federal regulation.
      2. Pre-motion and post-motion phases (production and distribution), ordinarily local - intrastate - and so not subject to federal regulation except when directly and substantially effecting interstate commerce.
   B. The part played by "intent" in extending the "flow" or motion of interstate commerce to either post-, or pre-motion phase, and thus rendering production or local distribution activities subject to federal control.
      1. "Intent" as element of penal or civil liability, distinguished from,
      2. "Intent" to affect interstate commerce, which, plus certain other factors, may extend federal regulation to operations in themselves wholly local.
   C. It is not necessary that the thing regulated constitutes a matter of commerce in and of itself; it suffices that it affects to a degree calling for regulation a commerce that may, all subject to the Fifth Amendment, be within the reach of the commerce clause.
   D. The group or industry concept as against the individual transaction concept, as subject to regulation.
   E. Total effect of a practice determining factor as creating cumulative results which may change the indirect effect of any individual act which is part of the practice to a direct and substantial effect on interstate commerce.
      1. Reasonable apprehension on the part of Congress as to results of such acts or practices.
      2. Effect of legislative findings.
   F. Extent to which business "affected with a public interest" may be regulated because so affected.

1. Meaning and history of the characterization "affected with a public interest".
2. Modern doctrine, liberalizing the scope of this term (Nebbia v. New York, 291 U.S. 502).
3. Degrees to which businesses or industries may be affected with a public interest and subject to regulation.
   (a) Public utilities generally.
   (b) Necessities.
   (c) Natural resources.
   (d) Other classes.

G. Conditions under which other business may be regulated.
1. Abuses (Adams v. Tanner, 244 U.S. 590, 594)
2. Where shown to be accompanied by evil results as ordinary incidents (Fairmont Creamery Co. v. Minnesota, 274 U.S. 1, 9)

II. The Commerce Clause and the Employer-Employee Relationship.
A. Extent to which Congress may regulate the working conditions of employees.
1. The federal police power is limited to the exercise of the powers expressly delegated to the federal government by the states.
2. Safety appliances and other conditions as security against accident may be the subject of reasonable legislation by Congress as to employees engaged in interstate commerce or in duties that directly or substantially affect such commerce:
   (a) To the full extent reasonably deemed appropriate by Congress, in certain classes of business (e.g., railroads,) affected with a public interest.
3. Health of employees is normally not the subject of federal regulation except where their health may affect interstate commerce (including the public, e.g., passengers, or where such employees are otherwise subject to federal jurisdiction).
4. Other factors affecting employees and their safe-guards, not including wages and hours.

B. Extent to which Congress may regulate wages and hours.
1. Classes of employees and employers within domain of the commerce clause (without regard to the operation of the Fifth Amendment).
2. Regulation of wages, generally, inhibited by the Fifth Amendment, except,
   (a) Where such a breakdown on account of labor troubles exists or threatens as to imperil the public interest (Wilson v. New, 243 U.S. 322)
      (1) This exception may be limited to business affected with a public interest.
      (2) Even then the regulation appears permissible only pending agreement.
   (b) Possibly in the case of minors.
   (c) Possibly also through price, where sweatshops (less-than-subsistence) wages in one state, as an element of price of goods in competition in interstate commerce, may

(1) Break down fair wage standards in the state or community of the market.
(2) Divert or destroy the lines of such commerce moving from states or communities of higher (fair) standards.
(3) Through voluntary agreements on the part of a substantial proportion of an industry, adhering to standards provided in some federal statute in promotion of commerce and effective only upon such adherence.

3. Regulation of hours is subject to similar inhibition, except that under the police power, state or federal (see II, A, 1) limitation of hours may be established
(a) Where the public safety is involved.
(b) In the circumstances mentioned under 2, (a), probably 2, (b), and possibly 2, (c), above.
(c) Possibly for certain classes by reason of health or occupation factors.

(This Table of Contents, regardless of the form of expression employed in some instances, must not be considered as asserting or implying any opinion as to the validity of any of the several theories or bases mentioned as possible in connection with any new legislation. All these are tentative merely, for further probing. This caution applies equally to the Summary of Preliminary Findings.)

LEGAL RESEARCH SECTION

Summary of Findings upon the Commerce Clause re Employer-Employee Relationship

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This study by the Legal Research Section is devoted to investigation of the extent of regulation of the employer-employee relationship permissible under that constitutional power, exclusive of fair trade practices which constitute a separate study; but including such fair trade practices as may be found useful in such regulation. The most important problem for solution is whether and to what extent wages and hours may be governed by any federal legislation, not only in transactions in or directly and substantially affecting interstate commerce, but in particular industries as such, which are engaged to such a predominant extent in such commerce that their intrastate activities cannot be separated from this predominant portion and therefore require single regulation. Related questions such as the right to regulate safety and other working conditions of employees, or to guarantee the right to bargain collectively or to pass mediation acts and to what extent such mediation can be carried are only considered incidentally because of their effect upon or illustration of the principal purpose.

The following conclusions have been tentatively reached (though generally requiring additional exploration). It will be noted that certain questions here stated have as yet no definite answer even indicated, although sufficiently important and promising as to warrant adequate research. They are based, however, upon the analogy of decisions rendered and facts presented to date.

1. Mining, manufacturing and production do not constitute nor come within the definition of interstate commerce, nor ordinarily within the dominion of the commerce clause. Nor do commodities or the operations upon those commodities at the terminal end of interstate transportation after delivery and the so-called breaking of bulk come within the federal jurisdiction, except in certain instances such as when the federal police power has been exercised (see keeping channels of commerce clean, paragraph 12). This police power has been confined to the expressly delegated powers, such as the commerce power, and may not be exercised except in connection with the exercise of those powers.

2. The commerce clause will not support any blanket regulation of all industry generally, from production to distribution inclusive. It may support particular industry regulation or particular unfair practice regulation.

3. The same conclusion probably appears warranted as to regulation of wages, hours and child labor applicable to industry generally. It does not necessarily apply to unfair trade practices except so far as the latter affect trade purely intrastate, and even there the matter of competition may, as shown later (paragraph 7, below) draw these practices within the federal regulative power.

4. The right to contract for both the value and hours of employment has been protected as a property right by the Fifth and Fourteenth Amendments, with few exceptions from all interferences heretofore attempted.

5. So far this protection has yielded, as to wages and hours, with the approval of the Supreme Court, only because of emergency conditions, and of considerations of safety, health and morals.

6. The regulation of wages by the Federal Government under the commerce power is subject to two constitutional considerations -- the commerce clause and the due process clause. While these are often considered jointly, they should be separately treated.

In order that the United States may regulate, the subject of the regulation, i.e., the payment of wages, must be in or directly affect interstate commerce. The payment of wages is ordinarily not a transaction in interstate commerce. Interstate commerce itself is, according to many decisions, roughly limited to the physical transfer of goods and commodities across state lines and is ordinarily held to begin after the manufacturing process and to cease when the goods or commodities have reached their original destination across the state line.

When the employer-employee relationship does not involve the purchase, sale or transmission of goods across state lines (usual case), it is ordinarily not in interstate commerce. The real question in regard to the possibility of regulating wages is whether and when they so directly and substantially affect interstate commerce as to justify federal regulation.

7. The economic effect of wages upon or in relation to goods or commodities actually flowing across state lines can arise in at least three particular cases:

(a) Through the physical obstruction (or shifting,) of the flow of goods across state lines which may occur when the failure to agree on wages may lead to an actual or threatened strike or labor dispute interfering with the flow of interstate goods.

(b) Through the sale price of goods moving in interstate commerce reflecting the wages paid and hence having an effect on competition in interstate commerce. Thus if the sale price of goods sold in interstate commerce reflects in their price the cost of labor, the wages may have an effect on the price of the goods. Price often is the main factor in the sale of goods in competition, and where price improperly affects competition, it may be regulated. Where the goods are sold in competition the successful competitor may secure the business while the unsuccessful competitors in interstate commerce are prevented from selling their goods just as effectually as if a physical bar were created. (The Supreme Court in the Schechter case refused to find a direct effect of wages since the price which was there regulated was an intrastate price in an intrastate market, while the price discussed here is an interstate price.)

(c) When the wages paid are reflected in the sale price of the goods and sales occur in such quantities as to undermine the sale of goods by local manufacturers in a state which has wage standards, it would seem that a way might yet be found to regulate interstate commerce so as to prevent its breaking down proper state standards. (Cf., however, 1st Child Labor Case). If the manufacturers of goods in a regulated state suffer in the commerce in that state from the competition of goods shipped from some unregulated state, a breakdown of the standards of the regulated state may be caused. This might give rise to the United States so regulating interstate commerce as to prevent such an occurrence.

8. Not only must there be an effect on interstate commerce which is direct or substantial but it would seem that the cause must be something which Congress reasonably can regulate. The sole fact that the economic effect of intrastate practices upon interstate commerce is economically bad is probably insufficient under the existing cases as a ground of Congressional regulation where the remedy is the interference with the highly protected right of contract between employers and employees. It is probable that not only must the economic effect upon interstate commerce be harmful but that in addition the cause must be something which is in the category of illegal or unethical or immoral causes against which the Supreme Court so far has felt it reasonable for Congress to legislate.

(Much research will still be required upon the above points, here stated in the way of tentative findings. The decision of the Supreme Court of the United States in Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931), holding the cutting of prices by a group of competitors against another who had just entered the field in order to preserve their existing monopoly and force the closing of his plant, to be within the federal jurisdiction and a violation of the Sherman Act, as well as certain other reasons and precedents, indicate a solution favorable to federal jurisdiction over selected industries under some of the conditions noted above that may prove sufficient in scope to warrant regulation if Congress should adopt such a policy.)

9. Where there is a definite intent (which may in certain circumstances be implied from the acts of the parties concerned or effects of such acts) to burden, obstruct, interfere with or restrain interstate commerce, the effect upon interstate commerce of the acts of these parties coupled with this intent may be, and usually is, held to be direct and substantial, thus bringing them within federal jurisdiction and the exercise of the commerce power.

As was said by Mr. Justice Cardozo in pronouncing the opinion of court in Baldwin v. Seelig, 55 S. Ct. 497, at p.500:

> ". . . Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruc-

tion is direct by the very terms of the hypothesis."
(Underscoring supplied)

This is particularly true in the case of strikes, primary and secondary boycotts, and keeping out of interstate commerce at the one end, or at the other preventing, the use of materials which would otherwise move or actually have moved in interstate transportation. This forms part of the basis of the research into and the statement of the subject of the finding numbered 7. It may also play a part in strengthening legislation that might, without accounting for this factor, find a narrower interpretation.

10. Where a certain act, in and of itself without substantial or direct effect upon interstate commerce, may repeatedly occur and there is basis for an apprehension or reasonable fear of the harmful effect of constant recurrence, then acts of this nature may be made the subject of regulation under the commerce power because their cumulative effect would become direct and substantial. This forms a portion of the basis for the research carried on in the statement of possible federal jurisdiction under the commerce power in finding numbered 11.

11. There is some possibility of valid regulation by voluntary agreement on the following bases:

(a) Congress might pass a statute setting up standards for wages, hours and fair trade practices, which in its judgment, supported by proper findings, and a reasonable factual basis, would promote interstate commerce as well as remove restraints in specified industries; but providing that these standards would become effective only upon definite adherence to them in the way of a written agreement by and between a substantial stated number of members of industry.

(b) Upon such adherence by a substantial number of members, in units and volume, Congress might thereby be clothed with jurisdiction, and the members so adhering become bound not merely by virture of their agreement, but by force of the statute to which by the terms of this agreement they had subjected themselves, because the cumulative action so produced might be found in certain instances to have a direct and substantial effect upon interstate commerce, which individual unrelated actions would not produce.

(c) Congress having once acquired jurisdiction over wages, hours and fair trade contracts involved in the business of these adherents, might prevent goods manufactured either by the minority not adhering or by any violators of these wage, etc., compacts from unduly interfering with the operation of these agreements in the channels of interstate commerce, by a cease and desist order issued upon proper notice and hearing before an administrative body provided for that purpose. This is upon the theory that the subject-matter once having come within federal control, undue interference might be prevented (not compliance required) in the same way as any other obstruction to interstate commerce.

12. That Congress has the power to keep the channels of interstate

commerce clean and as part of this to prevent or control by proper regulation the movement, barter and sale in interstate commerce of things either containing within themselves their lack of health or elements repugnant to the moral sense of the general public or which tend to promote or to sustain practices or lines of business or conduct contrary to such morality. As a corollary to this it should be added that Congress has also the right in such cases to protect those who do business on a higher plane from being drawn to the lower level through interstate competition; but it must be remembered that both these principles and their application, under cases decided to date, are limited to matters either criminal, fraudulent, deceptive, immoral or generally recognized by the community as contrary to good morals and decency.

If a payment of less than subsistence wages at any time falls into this category by the general consensus of opinion, these principles will most probably apply; and to some extent they may be used in connection with the lineof regulation now under research and set forth more fully in finding numbered 7.

13. Business affected with a public interest is subject to a stricter and more complete regulation than may be constitutionally exercised over business not so affected, and offers the more assured field of regulation as to hours and, in such limited areas as come within the scope of findings 7 and 11 (price and strike cases) as to wages. This is based on the supposition that such regulation is supported by the established facts of direct and substantial effect upon interstate commerce so as to bring it within the jurisdiction of the commerce clause, as more fully set out in the several foregoing findings.

As was said in Nebbia v. New York, 291 U.S. 502, "It is clear that there is no closed class or category of businesses affected with a public interest, * * * The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. * * * But there can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."

The degree of regulation, therefore, will depend on the nature of the business, the manner of its operation, its necessity to the public and the reasonable terms of any legislation required to meet that necessity.

14. If it be assumed that the federal government may regulate employer-employee relationships in industries in interstate commerce or as separate transactions in such commerce, then employer-employee relationships in intrastate commerce which substantially affect, or are inextricably intermingled with interstate transactions, may also be regulated upon the principle of the Minnesota Rate, Wisconsin Railroad Commission, and Public Utilities of Illinois cases.

LEGAL RESEARCH SECTION

POST OFFICES AND POST ROADS

Earle C. Calhoun

TABLE OF CONTENTS AND SUMMARY OF PRELIMINARY FINDINGS

This table of contents and summary of preliminary findings are primarily an exploration of the field as a basis for further work. Not all material in it has as yet been verified and checked, nor does it present a rounded treatment of the subject.

LEGAL RESEARCH SECTION

POST OFFICES AND POST ROADS

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LEGAL RESEARCH SECTION

Summary of Findings

POST OFFICES AND POST ROADS

I. Statement of facts:

Article I, Section 8, Clause 7 of the Constitution empowers Congress "to establish post offices and post roads". Article I, Section 8, Clause 18 authorizes Congress to enact all laws necessary and proper for carrying such power into execution.

II. Question.

Can Congress utilize its postal power as a basis for legislation prohibiting use of the mails by communications or parcels of industries which fail to comply with federal regulation of hours or wages of industry employees, or trade practices of industries.

III. Discussion.

I. Preliminary statement.

A. No other constitutional grant is clothed in words expressing so poorly its object, or so feebly indicating the particular measures which may be adopted to carry out its design.

Little discussion occurred during constitutional convention covering postal provisions of the Constitution. Existing provisions are same as contained in Constitution as adopted by constitutional convention.

Supreme Court has held postal provisions of the Constitution should be construed as designed to meet new conditions and circumstances and to keep pace with the progress of the country.

II. The postal clause of the Constitution grants complete, plenary power to Congress, which pre-empts the field and excludes state authority, and is subject only to constitutional limitations imposed upon the exercise by Congress of its enumerated powers.

Governments almost always monopolize postal power. The Supreme Court has upheld constitutionality of prohibiting private or state postal agencies. But establishment of federal postal system is dependent upon enabling statues which have been enacted.

Two opposite opinions have been advocated as to proper interpretation of postal provisions of the Constitution. One opinion is that Congress can only direct where post offices should be established and maintained, and on which roads mails shall be carried. The second opinion, approved by the Supreme Court, is that postal power of Congress is plenary and pre-empts the field, and includes the power among others, to determine mail matter that may be excluded.

Congress may delegate to the post master general the power to designate places where mails shall be received and delivered.

Congress has power under the postal clause of the Constitution to construct or to authorize individuals to build railroads to be used as post roads across states and territories.

Offence of robbing mails may be made punishable by federal law enacted by Congress. Act of Congress is constitutional which provides that forceable entry into a post office, or an attempt to do so, with intent to commit larcency or other depredation shall constitute a federal crime and shall be punishable by the federal government.

Congress has power to make it a federal crime to open a letter even after it has passed from actual control of the post office department and before manual delivery to addressee.

A state statute requiring a fast mail train to turn aside from direct interstate route and run to specified stations and back again in order to receive and discharge passengers is an unconstitutional obstruction of the mails.

Enactment of all regulatory legislation essential to enforcement of postal power of Congress is within scope of that power subject only to constitutional limitations.

Exclusion from mails is more easily defended than exclusion from interstate commerce.

Right to lawful use of postal service and conditions upon which it may be exercised rests wholly upon congressional legislation. Power to police mails is an incident of postal power.

Congress may exclude from mails matter which is dangerous or which carries on its face immoral expressions, threats or libels. The difficulty attempting such arises, not from want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from necessity of enforcing them consistantly with rights reserved to the people of far greater importance than transportation of mail.

Regulation excluding matter from mails cannot be enforced in way to require or permit examination into letters, or sealed packages subject to letter postage without warrant issued upon oath or affirmation, but that may be enforced upon competent evidence of violations obtained in other ways. Same rule applies to objectionable printed matter.

Congress may exclude from mails communications concerning lotteries; espionage; obscene, lewd, lascivious, or indecent matters; information concerning abortions; libelous or threatening matter; matter concerning schemes to defraud; poisons; insects; reptiles; explosives; intoxicating liquors; matter of a character to incite arson, murder or assassination; matters violating copyright laws; prize fight films; matter soliciting order for intoxicating liquors in prohibition states. This power exists at every step of postal service from first deposit in mail until final delivery to addressee.

The Supreme Court, in Hammer v. Dagenhart, 247 U.S. 251 (1918), held that Congress has no power to exclude commodities from interstate commerce, irrespective of their intrinsic character or the conditions of their production or consumption. But that case is not authority for a conclusion that Congress does not possess discretionary power, subject to constitutional limitations, to exclude matter from the mails under its postal power.

Railroads are by federal statute declared post roads. The same fullness of control exists over artificial highways, such as railroads and public highways as over waterways. The federal government, under its right of eminent domain, may compel postal service from railroads. The federal government may construct highways for transportation of mail and charge tolls for their use; also own and operate carriers and engage in business of a private nature in connection with its postal service.

Congress has authority to grant franchises authorizing corporations to construct highways and bridges to be used as post roads. Federal charters to railroads and bridge companies may be based upon the postal power of Congress, as may grants of rights of way through states.

III. Constitutional limitations upon the postal power of Congress.

A. Freedom of the press:

Real interference with freedom of the press is not permisible under the First Amendment. Any attempt by Congress to place a serious restraint upon the press, or even to deny the press postal facilities would receive a judicial veto.

B. Security from unreasonable search and seizure:

No valid law of Congress can authorize the postal authorities to invade the secrecy of letters and sealed packages in the mail. All postal regulation adopted relative to mail matter must be in subordination to the Fourth Amendment. This limitation operates chiefly upon administrative officials who attempt to obtain evidence of violations regulating matters excluded from the mails. Any unlawful opening of mail is dealt with criminally.

C. Due Process:

In determining whether a federal statute contravenes the due process guaranty of the Fifth Amendment to the Constitution, the guiding principle is that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have real and substantial relation to the object sought to be obtained.

All exclusions from the mails upheld by the Supreme Court can be justified as so-called federal police power regulations. The excluded articles are either inherently injurious, inimical to the health, safety and well-being of the recipients, or the use of the mails has been denied because such use would be in furtherance of a design that is condemned by moral considerations, or is against public policy.

If legislation to regulate hours and wages of industries should simply make matter relating to unapproved hours and wages non-mailable, and should penalize any attempt to use the postal service for its carriage, such legislation would be less objectionable than legislation purporting to deny delinquent industries mail facilities for all of its mail matter.

Congressional control of the mails may not be used as a lawful means to compel performance or non-performance of local acts, such as establishment of specified hours and wages by industries unless direct federal control is first established pursuant to some power of Congress other than its postal power, upheld as constitutional.

If industries violated a constitutional law enacted by Congress relating to hours and wages, Congress would have the right to exclude their mail matter from the mails, since it would be anomolous for the federal government to aid through its instrumentalities such as the postal service, persons or corporations violating valid laws.

Congress may exercise the right to exclude all matter from the mails, when to do so constitutes a necessary and reasonable means of rendering effective a policy which in itself is one which Congress has the constitutional right to enforce. The commodities clause of the Hepburn Act of 1906 represents this type of exclusion from the standpoint of interstate commerce.

The postal power of Congress is broader than its commerce power.

IV. Conclusions.

A. The postal clause of the Constitution delegates complete plenary power to Congress which pre-empts the field and excludes state authority. That power is subject only to the constitutional limitations imposed upon the exercise by Congress of its enumerated powers.

B. Although the postal power of Congress is plenary, extending to the classification and exclusion of articles presented for transmission through the mails, that power is subject to limitations, (1) as to freedom of the press guaranteed by the First Amendment, (2) as to security from unreasonable search and seizure pursuant to the Fourth Amendment, (3) as to due process required by the Fifth Amendment.

C. The courts have not yet determined the exact limits which Congress must not transgress in excluding matter from the mails. It seems clear, however, that in making such exclusions from the mails Congress may not arbitrarily, unreasonably, or capriciously deny the public rights guaranteed by the First, Fourth and Fifth Amendments, even in the exercise of the so-called federal police power; further, that Congress may not indirectly through its postal power interfere with or over-ride constitutional guarantees when to do so would be unconstitutional if attempted directly.

D. Congress, under the guise of an exercise of its postal power, may not regulate matters not otherwise within its powers to regulate. However, Congress, in the exercise of an acknowledged power, may reach indirectly a result which it is not constitutionally authorized to reach directly. It may enact Constitutional legislation

providing that mail matter of industries that violate a law, based upon the Commerce Clause or any other constitutional provision upheld by the courts as valid, regulating hours and wages of industry employees, or trade practices of industries, shall be denied the postal service. Congress may exclude matter from the mails, when to do so would constitute a necessary and reasonable means of rendering effective a policy which, in itself, is one which Congress has the constitutional right to enforce. Therefore, an Act of Congress held constitutional by the courts, regulating hours and wages of industry employees, or trade practices of industries, may contain a constitutional provision excluding matter of delinquent industries from the mails.

LEGAL RESEARCH SECTION

POSSIBILITY OF USE OF FLEXIBLE TARIFF PROVISIONS TO SECURE PROPER STANDARDS OF WAGES AND HOURS

James W. Irwin

TABLE OF CONTENTS AND SUMMARY OF PRELIMINARY FINDINGS

This Table of contents and summary of preliminary findings are primarily an exploration of the field as a basis for further work.

LEGAL RESEARCH SECTION

POSSIBLE USE OF TARIFF PROVISIONS TO SECURE PROPER STANDARDS OF HOURS AND WAGES

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LEGAL RESEARCH SECTION

POSSIBILITY OF USE OF FLEXIBLE TARIFF PROVISIONS TO SECURE PROPER STANDARDS OF WAGES AND HOURS

Preliminary Summary of Findings

1. The idea of "flexible tariff provisions to secure proper standards of wages and hours" is subject to two interpretations. The one with greater color of practicability is this: The legislative imposition on the Executive Department of the duty of raising and lowering tariff schedules in proportion as the industry benefited by the schedules in question maintains legislatively prescribed economic standards.

2. Such a plan would be logically appropriate because of the argument made by beneficiaries of the protective tariff, that it is for the benefit of American labor.

3. The proposal appears to be constitutional, the Supreme Court having already sustained the principle of a "flexible tariff" for the purpose of equalizing domestic production costs with those abroad.

4. Theoretically it might be possible to proceed under existing law.

5. Practically, if such proceedings are to be attempted new legislation would be essential.

6. A law along the line suggested would not be valid, if in its revenue raising aspect it were merely a colorable pretense.

7. A collateral purpose in legislation, even beyond the constitutional limits of federal authority, would not necessarily invalidate the law.

8. From the standpoint of general regulation of economic conditions, such a law at most could only be auxiliary.

9. There are other plans now challenging attention, having in view the same general object to be sought under the proposal considered in this memorandum. From among these plans probably some better method or methods could be selected.

10. Even as an auxiliary plan, such a measure would be of questionable practicability, because of various obstacles, e.g. the limited scope of its effect; general administrative difficulties (such as in 1926 let a Senate committee to advise the repeal of the existing flexible tariff law); and the violent protest which it may be assumed would be leveled at what would be alleged to be the indirection and subterfuge of the plan.

11. Possibibly the chief of all obstacles is that the economic standards of all members of any industry would not coincide. Variations in tariff rates would result in the benefit or detriment of all members of industry. ("The rain falls on the just and unjust alike.")

LEGAL RESEARCH SECTION

FEDERAL REGULATION THROUGH THE JOINT EMPLOYMENT OF THE POWER OF TAXATION AND THE SPENDING POWER

Victor E. Cappa

TABLE OF CONTENTS AND SUMMARY OF PRELIMINARY FINDINGS

This table of contents and summary of preliminary findings are primarily an exploration of the field as a basis for further work. Legally possible plans for new legislation are suggested merely as examples of the application of the principles and without reference to policy.

LEGAL RESEARCH SECTION

FEDERAL REGULATION THROUGH THE JOINT EMPLOYMENT OF THE POWER OF TAXATION AND THE SPENDING POWER

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LEGAL RESEARCH SECTION

FEDERAL REGULATION THROUGH THE JOINT EMPLOYMENT OF THE POWER OF TAXATION AND THE SPENDING POWER

Summary of Findings

The Supreme Court has sustained many taxing statutes whose primary purpose was regulatory rather than revenue raising. Other statutes of this type have been invalidated, particularly the child labor tax. The general principle of the decided cases in that the courts will not inquire into the collateral motives of Congress in enacting such measures where they do not disclose on their face any greater regulatory scheme than is incidental to the collection of the revenue to be raised thereby.

Slight differences have sufficed as bases of classification for tax purposes. Thus differences of social and economic consequences have been held to be sufficient.

It is believed that the economic and social consequences in periods of depression of certain labor practices such as the employment of child labor, the payment of sub-standard wages and the employment of laborers more than a reasonable maximum of hours may justify bases of classification for tax purposes.

The objections of the Supreme Court in the Child labor tax case and in other cases may be met by a simply drawn statute which contains no recital of purposes, bases of classification or detailed regulatory scheme beyond that incidental to the collection of the tax and which eliminates any penalty element and is directly proportioned to the extent of the privilege taxed and the frequency of its use.

The type of taxes which may be utilized either singly or in conjunction with the others for regulatory purposes to achieve N.R.A. purposes are:

First: a tax of 25 per cent on that part of payrolls which represents payments to children under fourteen years of age; second, a tax of 20 per cent on that part of payrolls which represents child labor between fourteen and sixteen years of age; third, a tax of 25 per cent on the differential between the sub-minimum wage paid to each employee and a minimum living wage determined administratively; and fourth, a tax of 50 per cent on that portion of payrolls which represents compensation for services rendered in excess of certain maximum hours of labor similarly determined.

In addition a federal bounty system may be inaugurated to make payments to complying units of industry or grants-in-aid to the states to finance the cost of administration of state N.R.A. agencies, or to their educational funds, on condition that they enact such social legislation as has been sustained by the Supreme Court in cases like Bunting vs. Oregon (ten hour day for all employees of mills, factories, and manufacturing establishments), Holden vs. Hardy, etc. The monies for these bounties can be raised by extending the present list of excises on the sale or use of certain commodities to include others, perhaps even to the extent of a

general sales tax. These monies would be paid into the general treasury and then disbursed by a separate appropriations bill.

The importance of having two separate bills is that under the doctrine of the companion cases of Massachusetts v. Mellon and Frothingham v. Mellon (infra) a taxpayer cannot attack a spending bill, as his interest in the treasury funds is too remote. The device of two bills keeps that interest remote. While there is some possibility that the Supreme Court may read these bills together, it is believed that the disinclination of that Court to pass on the spending power together with the rule of construction consistently adhered to by it in cases involving the validity of tax statutes makes it improbable that it will do so.

The device may be further used to secure compliance with N.R.A. standards as follows: A taxing bill would levy a five to ten per cent tax on the gross profits of all industry which tax would be remitted by a separate appropriation bill to those units of industry which comply with federal standards administratively determined. Ancillary devices such as the denial of the right to deduct sub-minimum wages may also be employed in aid of the main plans.

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LEGAL RESEARCH SECTION

THE TREATY-MAKING POWER OF THE UNITED STATES

Abraham C. Weinfeld

TABLE OF CONTENTS AND SUMMARY OF PRELIMINARY FINDINGS

This table of contents and summary of results of investigation are primarily an exploration of the field as a basis for further work.

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LEGAL RESEARCH SECTION

THE TREATY-MAKING POWER OF THE UNITED STATES

Summary of Preliminary Findings

INTRODUCTION

In 1934 the United States became a member of the International Labor Organization, which is composed of about 60 nations, and has its headquarters in Geneva, Switzerland. Each year delegates of the members meet in an International Labor Conference and approve drafts of international conventions and recommendations dealing with labor conditions. There is no obligation on any member to ratify any of the conventions or to comply with the recommendations, but there is an obligation to submit them to the competent authorities for such action as they may choose to take thereon. In June 1935, several conventions and recommendations were adopted by the International Labor Conference in which the United States was represented. It is, therefore, the duty of the United States to submit those draft conventions and recommendations to the competent authorities in this country for such action as they may choose to take thereon.

I. LABOR CONDITIONS AS A PROPER SUBJECT OF INTERNATIONAL NEGOTIATIONS AND TREATIES.

In the last thirty years numerous treaties have been entered into between and among nations for the purpose of regulating labor conditions. Conspicuous among them are the conventions adopted by International Labor Conferences after the World War of which about 35 have been ratified by numerous nations. Whether or not a matter is a proper subject of a treaty depends on whether it is actually dealt with in treaties in the ordinary intercourse of nations. Labor conditions have been so dealt with and therefore are a proper subject for international negotiations and treaties.

II. POWER OF THE STATES TO ENTER INTO AGREEMENTS OR COMPACTS WITH FOREIGN NATIONS, WITH CONSENT OF CONGRESS, TO REGULATE LABOR CONDITIONS

Though the United States Constitution permits States, with consent of Congress, to enter into agreements or compacts with foreign nations, that power does not extend to agreements or compacts regulating labor conditions. The agreements or compacts contemplated by the Constitution involve settlement of boundary lines and matters connected therewith.

III. THE FEDERAL GOVERNMENT HAS POWER TO ENTER INTO TREATIES WITH FOREIGN NATIONS REGULATING LABOR CONDITIONS IN BUSINESSES, THE REGULATION OF WHICH HAS BEEN RESERVED TO THE STATES.

The treaty-making power is by the express language of the Constitution superior to State laws; it therefore extends to matters ordinarily reserved to the States. This is the effect of an unbroken line of decisions of the Supreme Court of the United States construing the Constitution.

IV. THE FEDERAL GOVERNMENT HAS POWER TO ENTER INTO TREATIES WITH FOREIGN NATIONS REGULATING LABOR CONDITIONS IN BUSINESSES, THE REGULATION OF WHICH HAS BEEN DELEGATED TO CONGRESS BY THE CONSTITUTION.

A treaty which is self-executing, that is, a treaty which shows an intention that it be enforced without further legislation, stands on an equal footing with an act of Congress. Such a treaty may repeal an act of Congress dealing with the same subject-matter and an act of Congress may repeal a treaty; whichever is later in time prevails.

V. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AS A LIMITATION ON THE POWER OF THE FEDERAL GOVERNMENT TO ENTER INTO TREATIES.

Proceedings in the State conventions called to ratify the federal Constitution show that the people when ratifying the federal Constitution did so with the understanding that the Constitution would not encroach on their personal liberties. The due process clause is supposed to protect those liberties. Expressions by the Supreme Court of the United States in cases not involving treaties indicate that the Supreme Court will probably apply the due process test to treaties. In view of Adkins v. Children's Hospital, 261 U.S. 525 (1923) and as long as that case is law, the due process clause seems to be a barrier which precludes entering into treaties fixing minimum wages. On the other hand, the due process clause seems not to bar entering into treaties prohibiting child labor. The Supreme Court has never held such prohibition to violate due process, while it has held that prohibition of child labor in hazardous occupations does not violate due process. Similarly, there seems to be no legal barrier to entering into a treaty regulating maximum hours of labor; the Supreme Court has held that a statute fixing maximum hours in any mill, factory or manufacturing establishment did not violate due process and thus practically overruled an earlier decision to the effect that limiting hours of labor in a bakery violated due process.

VI. NEED FOR LEGISLATION TO MAKE A TREATY EFFECTIVE.

A treaty to regulate labor conditions must necessarily leave a vast field of regulation of details to the legislatures of the contracting parties. Normally, therefore, a treaty of that nature cannot be self-executing. For that reason no treaty regulating labor conditions should be expected to become effective until it is made effective by legislation. All conventions of the International Labor Organization call for legislation by the signatory states by way of giving effect to the conventions.

VII. RATIFICATION BY THE UNITED STATES OF CONVENTIONS ADOPTED BY THE INTERNATIONAL LABOR CONFERENCE.

Though under Article 405 of the Constitution of the International Labor Organization, a federal state the power of which to enter into labor conventions is subject to limitations may treat a draft convention as a recommendation only, the United States is not in position to avail itself of that privilege; the power of the United States government to

enter into labor conventions is not subject to limitations contemplated by the framers of Article 405. If the government had the right to treat a draft convention as a recommendation only, it would be under obligation to do no more than to forward a copy of the draft convention to the Congress and to the 48 legislatures, they to enact such legislation in conformity with the recommendation as they might choose to.

Since the United States must treat a draft convention as a draft convention, it is under obligation to submit to the Senate and to the House of Representatives the conventions adopted at the June 1935 conference. If those conventions or any of them obtain the approval of two-thirds of the Senate and the consent of the majority of the House of Representatives, the President may ratify them. Thereafter it will be up to Congress to enact legislation to give effect to the conventions that shall have been ratified.

The United States is under no duty to act on the conventions adopted by the International Labor Organization prior to June 1935, but it may ratify them, the procedure being the same as outlined with reference to the conventions adopted in June 1935. Each convention should first be passed upon by experts in the field covered by the convention, and if it is found adapted to American conditions, the convention may be submitted to the Senate and to the House.

In favor of ratification of the conventions of the International Labor Organization, it may be said that a statute passed pursuant to a convention would be binding throughout the country and would, therefore, not result in undue advantages or disadvantages to various states. Such a statute would express the popular will since it would have the backing of the House and of the Senate. Bad working conditions in other countries tend to lower the conditions here, while raising conditions in other countries tends to support or even to raise conditions in this country. The International Labor Organization is not necessarily tied to the League of Nations. It has several members who are not members of the League and could function even if the League should cease to exist.

Against ratification it may be said that the country dislikes foreign entanglements, and also that if another party to a convention should complain that the United States has failed to live up to its obligations under a convention, such complaint might ultimately come before the Permanent Court of International Justice. It is to be borne in mind, however, that membership in the International Labor Organization contemplates the possibility of ratification by the United States of at least some of the International Labor Organization conventions. Ratification necessarily carries with it the possibility of a complaint being made by another member , and ultimately coming before the Permanent Court, and the further possibility that the Court might indicate "measures of an economic character" which other members "would be justified in adopting against a defaulting government." So far none of the 61 members of the International Labor Organization has ever made a complaint against another member.

VIII. CANADIAN CONSTITUTIONAL PROBLEMS IN CONNECTION WITH RATIFICATION OF CONVENTIONS OF THE INTERNATIONAL LABOR ORGANIZATION. COMPARISON WITH PROBLEMS IN THE UNITED STATES.

The procedure by which treaties are made on behalf of Canada is so different from the procedure pursued in the United States, that there is no basis for comparison. As to distribution of legislative powers, in Canada the Provinces enjoy legislative powers which are exclusively enumerated as belonging to the Provinces, while all other powers rest with the Dominion government. Though the method of distribution of legislative power is the very opposite of the method in the United States, labor conditions are normally within the jurisdiction of the Provinces, just as they are normally within the jurisdiction of the States in the United States.

There is no due process limitation in Canada.

Several conventions drafted by the International Labor Organization and relating to labor conditions of seamen have been ratified on behalf of Canada, and have been followed by legislation passed by the Dominion Parliament. That body has jurisdiction over labor conditions of seamen, irrespective of international engagements.

As to those conventions of the International Labor Organization which regulate labor conditions in fields normally within the jurisdiction of the Provinces, the procedure was, until recently, to refer the conventions to the Provinces and to the Dominion Parliament for such action as they might choose to take thereon within the scope of their normal legislative powers. In 1931 and 1932 decisions of the highest constitutional court in the British Empire emphasized the power of the Canadian Parliament to enact legislation by way of giving effect to international conventions. In line with those decisions, in 1935 the Canadian government caused to be ratified several conventions which regulate labor conditions normally within Provincial jurisdiction, and the Parliament of Canada enacted legislation to give effect to those conventions in June and July 1935.

IX. SUGGESTIONS AS TO TREATIES WITH CANADA ABOLISHING CHILD LABOR AND LIMITING HOURS OF LABOR.

Since the standards fixed in the International Labor Organization conventions are generally too low for an industrially advanced country like the United States, the treaty power might be used to establish higher standards by a separate treaty with one or more powers as, for instance, by a treaty with Canada. Such a treaty would not be open to the objection of involving a tie-up with the Permanent Court of International Justice. Specifically, attention may be directed to the economic and political possibilities of a treaty with Canada limiting the age of admission of children to employment to 15, or perhaps 16 years, and limiting the hours of labor to 8 in the day and 40 in the week.

LEGAL RESEARCH SECTION

POSSIBILITY OF CHILD LABOR REGULATION UNDER FEDERAL WAR POWER

James W. Irwin

SUMMARY OF PRELIMINARY FINDINGS AND TABLE OF CONTENTS

I

This table of contents and summary of preliminary findings are primarily an exploration of the field as a basis for further work.

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POSSIBILITY OF CHILD LABOR REGULATION UNDER FEDERAL WAR POWER.

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LEGAL RESEARCH SECTION

POSSIBILITY OF CHILD LABOR REGULATION UNDER FEDERAL WAR POWER.

Summary of Preliminary Findings

(1) The constitutional foundation for such a proposal lies in Article I, Section 8, Subsections 1, 11, 12, 13, 14, 15, 16 and 18: more particularly in Subsection 1, 14, 16 and 18.

(2) If authority for Federal child labor legislation exists, it is on the theory that regulation or prohibition of child labor is a reasonable means toward providing a strong and efficient soldiery.

(3) A more exacting statement would be that such authority would exist only if child labor legislation be "necessary and proper" (Subsection 18 above referred to) to exercise of the express war powers. But in considering that terminology, it must be borne in mind that "necessary" as here used has never been considered to connote absolute compulsion, but that the word "necessary" is construed in connection with the word "proper."

(4) The proposal appears new, since so far as the writer has progressed in his study, no discussion has been found anywhere of the possibility of child labor regulation under the federal war power. On the contrary, leading advocates of child labor regulation have expressed the opinion that the efforts already made have exhausted the federal arsenal of weapons. However, the problem is not one of new basic principles, but of new applications of principles.

(5) The novelty of an idea, however, should not condemn it; and the memorandum will attempt to present ideas both for and against the possibility of such a plan.

(6) The factual aspect of the question, i.e., whether a strong case can be made for the practical military advantage of abolition or regulation of child labor, is logically the first consideration. A strong affirmative argument could be presented on this phase of the question.

(7) The continuing interest of Congress and the public in the general field of child labor regulation has been evidenced by three legislative efforts, and a proposed constitutional amendment.

(8) The failure of the three legislative attempts, and the precarious status of the constitutional proposal, suggest the pertinency of consideration of whether there is another approach.

(9) However, in connection with the above, analysis of the arguments that the constitutional proposal is <u>legally dead</u>, indicates the contrary.

(10) For the legal arguments against regulation under the war power, we may turn first to the decisions invalidating previous child labor

legislation, as the new proposal would inevitably meet the same line of attack.

(11) In brief that attack would be that child labor control is a power reserved to the states (or "to the people") and that Congress can not usurp the right by subterfuge.

(12) Owing to the novelty of the proposal, support for it must necessarily be based to a considerable degree upon theoretical discussion of constitutional interpretation. However, certain phases of the argument may be well buttressed with cases.

(13) Ample authority may be cited for the proposition that the courts have heretofore been liberal in construction concerning federal authority under the war power.

(14) Numerous cases may be cited also to show that collateral purposes (even going beyond the scope of constitutional authority) do not necessarily invalidate legislation.

(15) The federal sovereignty is supreme in the realm of war powers.

(16) Congress has, without challenge, assumed the right to define "the militia" so as to include the military man power of the country, whether or not under arms or in military organization; so it may reasonably be argued that the right of definition can be further extended.

(17) Conclusion: The proposal would meet most formidable obstacles. Yet there is a reasonable possibility that a measure regulating child labor could be drawn under the war power, which would be held constitutional.

LEGAL RESEARCH SECTION

TRADE PRACTICES AND THE ANTI-TRUST LAWS

W. A. Whittlesey

TABLE OF CONTENTS AND SUMMARY OF PRELIMINARY FINDINGS

This table of contents and summary of preliminary findings are primarily an exploration of the field as a basis for further work. Not all material in it has as yet been verified and checked, nor does it present a rounded treatment of the subject.

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Note: This study has not progressed beyond the collection of material dealing with this subject.

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Note: This study is in progress and requires additional work before a proper summary can be made.

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V. Tying Contracts and Full Line Forcing.

Note: No work has been done on this subject and it is impossible to make a table of contents.

VI. Guarantee Against Price Decline.
- A. Not illegal.

VII. Production Control.

Note: No work has been done on this subject and it is impossible to make a table of contents.

VIII. Capital Combinations and Mergers.
Note: This subject is in process and will be completed later. No table of contents can be prepared at this time.

IX. Price and Information Filing.
A. Filing of past prices.
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C. Miscellaneous information filing.
Note: Aside from the collection of the material no work has been done on this study. It is impossible to make a summary at this time.

X. Cooperative Credit Information.
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XIII. Uniform Cost Accounting.
No work has been done on this subject and it is impossible to make a summary at this time.

XIV. False and Misleading Advertising, Misrepresentation, Deceptive and Fraudulent Trade Practices.
No work has been done on this subject and it is impossible to make a summary at this time.

XV. Predatory and Coercive Trade Practices.
No work has been done on this subject and it is impossible to make a summary at this time.

XVI. Exploitation of Labor as an Unfair Trade Practice.
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LEGAL RESEARCH SECTION

TRADE PRACTICES AND THE ANTI-TRUST LAWS

Summary of Preliminary Findings

In General - Scope and Extent of Study.

This study is not a symposium of the anti-trust laws but relates only to those trade practices hereinafter listed. No attempt has been made to consider the question of constitutional jurisdiction; the study has been predicated upon the assumption that interstate commerce has been sufficiently proven to warrant federal jurisdiction. Nor does this study attempt to show what is advisable - it merely attempts to distinguish between that which is legal and that which is illegal and the reasons therefor. The study, when completed, will not suggest legislation of any description; it will be a source material that may be used as a reference.

Students of the anti-trust laws seldom consider them ideal. Such a prominent authority as J. A. McLaughlin advances the theory that they represent a certain minimum protection of the public interest subject always to reexamination and modification by legislation or court judgment, which should be retained in the absence of any alternative method of control. Many of the attacks on the anti-trust laws have been instigated by loose-knit organizations who contend that the anti-trust decisions have caused capital combinations and mergers resulting in the gigantic corporations and multiple holding companies prevalent today. Whatever merit their argument may have, it is true that the anti-trust laws have, generally speaking, failed to provide that modicum of protection for the consumer and for what is known as the little independent. Since the decision of the United States Steel Case many of the prosecutions and equity actions undertaken have been instituted against these loose-knit organizations, possibly because evidence showing a combination or a conspiracy was more easily obtained than against the corporate structural type.

Perhaps, as some writers contend, the failure of the anti-trust laws to achieve the desired ends is due to the inherent restrictions placed upon the anti-trust laws by the Constitution. On the other hand, many writers contend that the Supreme Court itself, by its own interpretations, drastically restricted the operation of the anti-trust laws. One of the bases of their argument is the fact that many of the judicial decisions interpreting additional legislation say that such legislation is merely declaratory of present existing law. Then too, W. J. Donovan in 1932 said that if the Sherman Act were repealed business men would soon find that the limitations on them do not arise from the Act but "from the inability of the leaders of business to act constructively when a common interest is at stake". Whether or not the "self-government of industry" idea (or perchance ideal) was successful under the N.R.A. is not within the scope of this study.

A subject too often ignored is that of the consumers' interest. Though enacted to preserve the independent and protect the general public, the anti-trust laws have become industrial legislation. Many times the courts refer to the "protection of the public", "the public interest," but too often these phrases appear to be after-thoughts; mere window dressing for the decision.

The trade practices hereinafter considered are those that form the foundation for any consideration of the anti-trust laws. These practices will be considered in full detail in the study proper, when it is completed. When such trade practices are under consideration it must be remembered at all times that conspiracy, combination, or common law deception form the fundamental background for the statutes upon which the decisions are predicated.

Attention is called to the fact that a few of the trade practices treated in the study (notably exploitation of labor as an unfair trade practice) have been prepared in reply to specific questions submitted.

I. Price Fixing.

Price fixing has been uniformly condemned by the courts, regardless of the form by which it was presented. This condemnation persists despite any question of reasonableness or unreasonableness of the prices so fixed, for price control, reasonable today, may become unreasonable tomorrow. Many of the cases involving price fixing are important because of the continued assertions by the court that price fixing is inimical to the Public interest. This is one point decided on the ground of public interest. Some writers imply that the Supreme Court has changed the Sherman Act from a law against combination to a law against fixing prices. None of the cases considered under the anti-trust laws treat the subject of governmental control of prices. Such cases do not come within the scope of the anti-trust laws and involve different constitutional principles than those upon which the anti-trust laws are based. Note: The subject of price fixing has not progressed beyond the collection of material dealing with this subject.

II. Resale Price Maintenance.

Regardless of any prescription of the anti-trust laws, a manufacturer cannot sell goods, imposing conditions thereon as to the price at which goods may be resold, which conditions follow the goods into the hands of persons with whom he has no contractual relation. Such conditions are obnoxious to the public interest, and repugnant to the absolute title conveyed.

Nor may sellers of goods, whether manufacturers, distributors, or retail dealers, combine to maintain prices on goods, as such a combination is a restraint of trade within the meaning of the anti-trust acts.

Four methods of resale price maintenance have been considered by the courts. These are described as the contract system, the rebate system, the agency system, and the plan of refusing to sell to those who fail to maintain an indicated price. In general, only the contract system is

illegal. However, the agency system must prove to be a true agency - not a disguised sale; and a refusal to sell must not be accompanied by such activities as were condemned in the Beechnut Case, 257 U.S. 441, 66 L.Ed. 307. Patented, copyrighted, trade-marked, or secretly processed goods do not occupy any better position than other goods when involved in resale price control plans.

The Federal Anti-trust Laws have not been able to completely prevent resale price control. The inherent freedom of individuals that in some measure limits resale price control also has an opposing corollary that aids resale price control. In other words, the free alienation of property may not be restricted by resale conditions; yet opposing this proposition is the right to establish and maintain agencies, which agencies may maintain prices.

Despite these inherent limitations, the anti-trust acts have effectively eliminated many resale price plans, and in so doing rendered valuable aid to the protection of competition.

III. Price Discrimination and Customer Classification;

Price discrimination based upon a quantity discount is expressly exempted under the anti-trust laws. Otherwise, it has been held that the Clayton Act declares unlawful any discrimination which substantially lessens competition not only between the seller and his competitors, but also between the buyers and his competitors. Attention is drawn to the words of the Clayton Act requiring that the lessening of competition must be substantial. Note: This study is in progress and requires additional work before a proper summary can be made.

IV. Destructive Price Cutting and Below Cost Selling.

Under our present laws every phase of destructive price cutting can not be prohibited. An individual may sell his goods at what price he desires or he may give them away. On the other hand, he may refuse to sell, buy or deal with any person he desires. The lower federal courts have specifically held that there is no prohibition against sales below cost, i.e., loss leaders, and a person may make almost any type of contract for the sale of goods regardless of the economic soundness of that contract. However, destructive price cutting is illegal when used by a group as a weapon to drive out competitors.

V. Tying Contracts and Full Line Forcing.

Note: No work has been done on this study and it is impossible at this time to make a summary.

VI. Guarantee Against Price Decline.

The practice of guaranteeing the price of a commodity against decline is not in and of itself an unfair method of competition.

VII. Production Control.

The Production control referred to in this study means control by

combination or agreement by those persons in that industry; not governmental control. Note: No work has been done on this topic. It is impossible to predict what the summary will be.

VIII. Capital Combinations and Mergers

This study is in process and will be completed within the next two weeks. No summary can be made at this time.

IX. Price and Information Filing.

The filing of past prices has been approved; the filing of future prices has been condemned. The disclosure of future prices plus the disclosure of intimate details of business management between competitors has been condemned by the courts. Filing of prices with a governmental agency will not be considered in this memorandum. Note: Aside from the collection of the material no work has been done on this study. It is impossible to make a summary at this time.

X. Cooperative Credit Information.

Aside from the collection of material no work has been done on this study. It is impossible to make a summary at this time.

XI. Boycotts.

While not all boycotts are illegal, the courts under the anti-trust acts have condemned all boycotts that restrain interstate commerce, even peaceful ones.

XII. Basing Point Systems.

Basing point systems - a method of computing and correlating mill prices and freight rates so that only delivered prices are quoted - are usually confined to use in heavy commodity industries. The cases involving basing point systems do not decisively establish their legality. The Federal Trade Commission has condemned them.

XIII. Uniform Cost Accounting.

No work has been done on this subject and it is impossible to make a summary at this time.

XIV. False and Misleading Advertising, Misrepresentation, Deceptive and Fraudulent Trade Practices.

No work has been done on this subject and it is impossible to make a summary at this time.

XV. Predatory and Coercive Trade Practices.

No work has been done on this subject and it is impossible to make a summary at this time.

XVI. Exploitation of Labor as an Unfair Trade Practice.

This study was made for purposes of making a reply to specific questions submitted. So many fundamentals must be assumed or evaded in the treatment of this subject that no summary is possible.

LEGAL RESEARCH SECTION

DELEGATION OF LEGISLATIVE POWER

Emanuel Bublick

TABLE OF CONTENTS AND SUMMARY OF PRELIMINARY FINDINGS

This table of contents and summary of preliminary findings are primarily an exploration of the field as a basis for further work. Not all material in it has as yet been verified and checked, nor does it present a rounded treatment of the subject.

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LEGAL RESEARCH SECTION

DELEGATION OF LEGISLATIVE POWER

Summary of Preliminary Findings

New Industrial Legislation will not be secure from constitutional attack on the ground that it involves an invalid delegation of power unless the Act: (1) clearly describes trade practices (and labor practices and conditions) which Congress determines and finds that it wants regulated -- i.e., what it wants done? (2) clearly sets forth the occasion when it wants the trade practices (and labor practices) regulations invoked, i.e., when it is to be done?

The delegation of the code-making power was held invalid in the Schechter case because the act to be performed was not definite and because "the necessity, time, and occasion of performance have been left in the end to the discretion of the delegate".

Requirement (1) and requirement (2) each involves a problem of delegation.

To conform with requirement one, Congress can enumerate certain trade and labor practices which it regards as a burden on interstate commerce, e.g. selling below cost, or paying a sub-standard wage. The difficulty becomes apparent when we reflect the Act has not sufficiently described the practice against which it is legislating unless the definition of what its concept of "selling below cost" or a "sub-standard wage" is. Were the Act merely to recite that "selling below cost" or payment of a "sub-standard wage" are the objectives against which it is aimed and leave to the President or administrative body the determination of what constitutes "selling below cost" or a "sub-standard wage", the Supreme Court would, in all probability, hold that Congress had not sufficiently defined its legislative objective. Yet, of course, Congress could not be expected to define the cost of production of each commodity or the standard wage of each type and variety of employment. The Act must indicate generally the mode of finding the cost of production or the standard wage, i.e., the theory at least must be expounded. Taking the sales below cost as an illustration, the Act must first of all specify whether the cost of production of the individual producer is intended or whether some average is intended.

The formula proscribed in connection with the procedure for finding the equalized production cost in United States and competing country, the statute 19 U.S.C. 156 mentions only "wages, cost of materials and other items of cost of production". The Bituminous Coal Conservation Act of 1935 recited: Many more factors to be taken into consideration in determining cost, i.e.; "the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation, and depletion (as determined by the Bureau of Internal Revenue in the computation of the Federal income tax) and all other direct expenses of production, coal operators' association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of Administration."

It appears impossible to state in what detail all the factors that are to constitute the cost of production must be specified in the statute. All that can safely be concluded is that the leading factors must be specified and the scope of many additional minor factors should be indicated. The test is, has Congress given an intelligible definition of cost of production? -- Does the Act supply criteria enough to give a fair notion of what it wants? While such a test seems vague, it is the only one that can fairly be gathered from the decided cases and it appears to be the yard-stick applied by the Supreme Court.

When the statute has defined its understanding of cost of production it may instruct an administrative agency to establish a procedure for the formula to determine production cost in accordance with the legislative definition.

In the matter of wage regulation, it will be necessary for Congress to set forth a standard for the administrative agency to apply. The legislative standard may be that of a subsistence minimum, or living wage, a variable cost of living index; prevailing wage, percentage of profits to the entrepreneur or one of several other standards. The choice of alternative theory of wage control must be left to the economist rather than the lawyer. The standards laid down by the Act will have to be sufficiently clear that the administrative agency can proceed to put the same into effect without its evolving theories of wage control. The delegate of the power can be authorized to investigate the facts and hold hearings and establish rates according to the formula urged by Congress. The delegate or administrative body may be directed to establish classifications according to skill and historic differentiations in the industry. This latter delegation will probably be upheld on the ground that if Congress has laid down the standard for the basic minimum wage, the differentiation of skill is a technical matter to be determined by technical and expert evidence. While specific reference has been made in the above discussion to two practices only, namely, the trade practice of selling below cost and the labor practice of minimum wage, the principle holds true for each practice sought to be regulated by Congress; to clearly identify each practice against which the Act is directed and the regulation it seeks to impose.

We have discussed above the requirement that Congress define adequately what it wants to be done, i.e. the incidents of trade or labor practices over which it is exerting jurisdiction. This is designated by Mr. Justice Cardoza in the Schechter case "as the act to be performed". We come now to a discussion of the question of delegation in relation to what Mr. Justice Cardoza calls "the necessity, time and occasion of performance". In other words, if the Act does adequately portray what it means by cost of production or minimum wage it will in addition have to provide in what industries or under what circumstances such practices shall be proscribed or such regulations imposed. The question as to the delegation of the occasion when Federal control shall vest is fraught with great difficulty and is subject to some differences of opinion.

I am presenting below the two leading contentions each of which has its adherents amongst those who have studied the question.

1. The functional approach.

Congress finds certain activities to be inherently uneconomic and bad (such, for instance, as selling below cost). In order to keep the channels of interstate commerce healthy and clean, it instructs its administrative agency to prescribe rules for the determination of cost, setting forth in the Act in a general way the factors upon which the promulgation of such rules may be based. The issuance of those rules, however, will be conditioned upon the jurisdictional requirement that they shall be applicable only as to individuals, firms or corporations whose selling below cost is found to have a direct prejudicial effect upon the nature and extent of commerce among the states.

In pursuance of such an act, the administrative agency will study selling below cost practices in all industries, and will publish the rules it formulates. Complaint will be filed that a named corporation is selling below cost in such a way as to prejudicially affect interstate commerce. The agency will hold hearings similar to those conducted by the Federal Trade Commission, and if it finds that the selling operations of the respondent (whatever his industry affiliation) directly affect interstate commerce, the punitive provisions of the bill should be applicable to him.

The coverage intended in such a bill would be for all activities within the scope of the commerce clause (disregarding industry) with Congress leaving it to the Delegate to determine which activities are within the commerce clause, and to formulate the regulations intended to apply to such activities within the standards prescribed.

It has been contended that this type of delegation is valid provided that a procedure be set up for a judicial review of the decisions of the administrative agencies; that such a set-up has been approved in the Federal Trade Commission Act; and that the Wagner Labor Disputes Act follows this procedure.

2. The Individual Industry Approach.

The advocates of this theory question the conclusion of the adherents of the functional approach theory that the plan based on the latter satisfies the requirement for a proper delegation of power. The contention is made that delegation to an administrative body of authority to make a finding that particular instances of selling below cost or that the selling below cost activities of particular individuals, firms or corporations, have a "direct prejudicial effect" upon interstate commerce is too broad a delegation of power to be likely to be sustained by the Courts. To obviate the necessity of making the administrative body the judge of what is or is not directly prejudicial to interstate commerce, it is suggested that Congress in the Act enumerate industries and incidents of trade practice and labor control which it wishes to impose in the industry so far as the interstate power of the Federal government can go, to wit: (1) The Act will enumerate one industry and provide that in that industry there shall be a prohibition of sales below the cost of production; will enumerate another industry and provide that for that industry, there shall be a minimum wage established; will enumerate a third industry and provide that for that industry there shall be both a prohibition of sales below cost of production and the minimum wage control. To the administrative agency will be delegated questions of fact only, i.e., the finding that one of the prescribed practices in

the industry e.g., selling below cost, has been proved in the particular instance. (2) That the said Act or practice is in interstate commerce, in the flow of interstate, or directly affects interstate commerce. It would not be necessary for the administrative agency to determine whether the selling below cost constitutes a burden upon or is harmful to interstate commerce, -- that selling below cost in that industry is a burden upon and harmful to interstate commerce has already been decided and found by Congress in the Act.

A problem which is partly that of the draftsman and partly of the economist is that the Act must contain a comprehensive description of each industry enumerated, so as to leave no legitimate doubt as to who or what is included in the industry.

The individual industry approach is close to the type of legislation illustrated by the Bituminous Coal Conservation Act of 1935 and the bill for regulation of the textile industry known as the Ellenbogen Bill H.R. 9072.

While the individual industry approach appears to hurdle the problem of delegation, it has the practical disadvantage of prohibition of each instance of the practice through the interstate commerce field of the industry.

There is another approach which would dispense with the enumeration of industries, achieve greater flexibility and yet not fall under the condemnation of invalid delegation. This approach requires an exposition by Congress in the Act of the economic phenomena accompanying or resulting from the practices which it is seeking to denounce. To illustrate - if selling below cost is a burden upon and an obstruction to interstate commerce because it causes the bankruptcy and failure of many members of an industry, then Congress may delegate to the administrative agency the duty of prohibiting sales below cost upon a finding that sales below cost, in a certain industry are causing bankruptcies and failures; or if selling below cost is a burden upon interstate commerce because it causes the diminution of the amount of interstate shipments, Congress may delegate to the administrative agency the duty of prohibiting sales below cost upon its finding that sales below cost in a certain industry are reducing the amount of interstate shipments. The findings of fact of the administrative agency under these hypotheses would be a real finding upon factual data, not a determination by the delegate of a matter of legislative policy.

The difficulty with the third approach is that it requires exhaustive economic research and the formulation in the Act of a theoretic basis for each trade practice or labor regulation which can be practically applied.

Upon consideration of these three suggested approaches to the problem of adequate legislative standards for the application of the prescribed practices, it would appear that the "economic-analysis approach", that is the third approach, would be the easiest to sustain from the standpoint of the problem of delegation of legislative power - but there appears to be a question as to its economic feasibility. The "functional approach" requires what may be held to be an illegal delegation of

of legislative power. The "enumerated industries approach" lacking somewhat in flexibility seems fairly secure from attack upon the ground of illegal delegation.

LEGAL RESEARCH SECTION

DUE PROCESS AS APPLIED TO FEDERAL REGULATION OF ECONOMIC CONDITIONS.

James W. Irwin

STATEMENT IN LIEU OF SUMMARY OF FINDINGS, AND TENTATIVE TABLE OF CONTENTS FOR MEMORANDUM

This statement in lieu of summary of findings, and tentative table of contents for memorandum is primarily an exploration of the field as a basis for further work.

DUE PROCESS IN RELATION TO FEDERAL REGULATION OF ECONOMIC CONDITIONS

I. Genesis of the due process idea
   A. The English "Law of the Land"
   B. The Fifth Amendment - its purposes
   C. The Fourteenth Amendment - its purposes

II. A basic conflict: The substantive against the procedural theories of due process.

III. Details on the procedural side of due process
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IV. Results of adopting the substantive theory of due process
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V. Application of due process to hours of labor
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VI. Application to minimum wages
   A. Generally
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VII. Application to public utilities

VIII. Application to trade practices

IX. Application to "economic planning."

X. Conclusion: What would the Supreme Court have said, if it had treated the expressly excluded contentions of Schechter on due process?

LEGAL RESEARCH SECTION

"DUE PROCESS" AS APPLIED TO FEDERAL
REGULATION OF ECONOMIC CONDITIONS

Statement in Lieu of Summary of Findings, and
Tentative Table of Contents

Owing to contraction of personnel in the Legal Research Section, the undersigned was recently directed to make a study of the topic "Due Process" previously assigned to another attorney. There having been several prior general assignments, work on this topic is in an inchoate conditions, and in lieu of the requested "findings", there can at this time only be given a statement of the projected scope of study.

The first question presenting itself is, what aspects of the general topic are most applicable for consideration as a problem for N.R.A.? This leads to the subject stated "Due Process as Applicable to Federal Regulation of Economic Conditions." *

* This topic has such a great sweep, that it may appear desirable to contract it further.

From this skeletonized subject I have already taken one rib, and have made and handed in a completed preliminary draft on "DUE PROCESS DOCTRINE OF THE ADKINS CASE" (Adkins vs. Children's Hospital, 261 U.S. 525). In other words, I treated there in the topic of the possibility of regulation of maximum hours of labor for women under the theory of protecting health and morals. The memorandum on this small segment of the Due Process topic consisted of about twenty-five pages.

In working on due process there will be found a profusion of cases, many of which have invalidated, and many of which have sustained, legislative acts under attack as violative of due process.

Some of those decisions are considered landmarks. Among the early ones were those establishing the right of governmental regulation of public utilities. It may be expected that a great battle-ground of the immediate future will concern attempted extensions of these early decisions.

There will also be found many cases centering around due process as applicable to varying aspects of control of economic conditions. The conflict over the concept of due process has become increasingly vigorous during the New Deal period, with the line fluctuating back and forth from the time of the Nebbia decision on milk control to Judge Coleman's recent decision on the Utilities Act.

The following is submitted as a tentative outline for a memorandum, preparation for which is under way, covering the aspects of "Due Process" which appear most vital for N. R. A. study.

LEGAL RESEARCH SECTION

POSSIBLE USE OF GOVERNMENT CONTRACTS PROVISIONS AS A MEANS OF ESTABLISHING PROPER ECONOMIC STANDARDS

James W. Irwin

TABLE OF CONTENTS AND SUMMARY OF PRELIMINARY FINDINGS

This summary of preliminary findings and table of contents are primarily an exploration of the field as a basis for further work.

LEGAL RESEARCH SECTION

POSSIBLE USE OF GOVERNMENT CONTRACTS PROVISIONS AS A MEANS OF ESTABLISHING PROPER ECONOMIC STANDARDS

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      2. Possibility of including other economic conditions.
      3. The Walsh Bill as illustrative of the restricted scope; Executive Orders 6246 and 6646 of the expanded scope.
   B. Present Status of Walsh Bill.

II. Situation in Absence of Legislation.
   A. Section 3709 R. S. and interpretations thereof as necessitating statutory change before Government can attempt control of economic conditions through contract provisions.

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   A. General recognition of necessity.
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LEGAL RESEARCH SECTION

POSSIBLE USE OF GOVERNMENT CONTRACTS PROVISIONS AS A MEANS OF ESTABLISHING PROPER ECONOMIC STANDARDS

Preliminary Summary of Findings

1. A plan of federal government regulation of economic conditions through contract provisions in government contracts, might theoretically extend to a wide scope of regulatory conditions. However, popular discussion of the proposal seems to be limited to problems of wages, hours, and child labor. This restrictive point of view is illustrated by the Walsh Bill while the broader aspect was illustrated by Executive Orders 6246 and 6646.

2. No such control is practicable under existing laws because of Section 3709 R. S. and the interpretations thereof.

3. It is scarcely subject to question that a law may constitutionally be enacted which will enable the federal government to include in its contracts provisions calculated to control the economic standards in the businesses of the parties being brought into privity of contract with the government.

4. The law could also permit the requirement that such contracting parties require similar standards from those contracting with them in regard to the subject matter of the government contracts.

5. If the federal government is to attempt any control of conditions pertaining to wages, hours, and child labor, legislation similar to the Walsh Bill seems worthy of serious consideration.

6. A serious constitutional question is whether Congress must "fix the standards" of such contract provisions. The writer of this memorandum is of the opinion that this is not necessary, whatever may be wiser as a matter of policy. The opinion is expressed that the Executive Department in representing the government's own business may include in its contracts any reasonable requirements as to the economic standards of the other contracting parties, if only the existing bar of Section 3709 be removed.

7. Broad executive discretion such as is provided in the Walsh Bill appears necessary under such a plan. Such executive discretion should extend to the granting of exemptions from and modifications of such requirements, or it appears that the whole scheme would be too rigid to be practicable.

LEGAL RESEARCH SECTION

SUMMARY OF PRELIMINARY FINDINGS AS TO STATE RECOVERY LEGISLATION

Emanuel Bublick

This summary of preliminary findings and table of contents is primarily an exploration of the field as a basis for further work. Not all material in it has as yet been verified and checked, nor does it present a rounded treatment of the subject.

LEGAL RESEARCH SECTION

SUMMARY OF PRELIMINARY FINDINGS AS TO STATE RECOVERY LEGISLATION

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X. State Recovery Legislation Cited

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XII. Bituminous Coal Conservation Act of 1935
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LEGAL RESEARCH SECTION

SUMMARY OF PRELIMINARY FINDINGS AS TO STATE RECOVERY LEGISLATION

Preliminary Summary of Findings

OBJECTIVES

1. To make intrastate transactions which can not be reached by Federal power subject to the same regulatory provisions as transactions of the same industries which are within Federal power on the ground that the latter are in or affect interstate commerce.

2. To restrain and punish by State law offenses within the state against interstate commerce.

CONCLUSIONS

Automatic conformity of transactions not affecting interstate commerce to the Federal regulations for business and trade affecting interstate commerce cannot be achieved by fiat as attempted by many State Recovery Acts of the past two years. The State legislature must itself lay down the standards of business conduct. It can lay down for intrastate business the identical standards that the Federal Act sets forth for interstate business. The State standards borrowed from the Federal Act will not be valid unless the Federal standards are valid, i.e., unless the delegation of power in the latter is not too broad. Whatever rule-making or regulatory power the Federal Act may properly delegate, the State Act may delegate. Many state constitutional provisions or state decisions prohibit the adoption by reference and the incorporation by reference of the laws of another state or the Federal government. Such provisions or decisions safeguard only the legislative function -- they do not prohibit the adoption or incorporation of proper administrative rules, regulations, or fact finding. Whatever function the State Act could delegate to a state administrative body, it can adopt from a federal administrative body. Having set up adequate standards and proper criteria for administrative action, the State Act can provide that such regulations, rules, and fact findings of the federal body which conform to the criteria should be the law of the State.

For practical administration of the State Act, one suggestion which seems legally practical is to nominally make the delegation to a state officer or body and direct him to promulgate such rules, regulations, and finding of fact of the federal body which conform to the said criteria.

The Federal Act will, it seems, have to enumerate industries and well defined incidents of regulation. The State Act will also have to enumerate industries and incidents of regulation. The State Act may omit certain industries or incidents of regulation. Whatever incidents or industries are included must be defined by the statute identically with the Federal statute, so that the administrative act will conform with the criteria of both the Federal and State Act.

The regulation industries to be covered in the State Act will have to stand the test of due process. The regulation of some industries enumerated in the State Act may fail as not being affected with a public interest -- others will survive. It is assumed that the recent more liberal criterion of the Nebbia Case will be applied. The need of uniformity with federal regulation of interstate transactions of the industry will be a strong argument in favor of the necessity of state regulation of the intrastate transactions of the industry. It is not, however, a necessary conclusion that states can regulate internally industries, the interstate aspects of which the federal government can regulate on the ground that the industry is affected with the national public interest. An industry may be affected with the national public interest, affected with a state public interest in some states and not affected with a state public interest in others. Although it may be held that the federal government can regulate the Bituminous Coal Industry, it does not follow that a state can fix a minimum wage in the production of coal in the mines of the state.

The above conclusions are directed towards the efforts of a state to impose regulations (similar to the federal imposition upon transactions in the industries which affect interstate commerce) upon transactions within the state which do not affect interstate commerce.

The state can also aid Congress in making the federal offenses committed within the state, against interstate commerce a state offense subject to state punishment or restraint. For exercising its power in this respect two requirements must be met:

1. There must be a specific provision in the federal statute giving the state power to concurrently effectuate the federal legislation.

2. The regulation which the state seeks to enforce must be within the scope of the police power of the state.

The mechanism for this aspect of state cooperation would be the same as that sketched for the first field of state aid, namely, the state enactment of legislation identical with the federal regulation and the adoption of such acts of the federal administrative agency as conform to the state standards. This mode of state cooperation is available in connection with federal legislation extending the scope of power of the Federal Trade Commission; federal legislation based on strikes and labor disputes pertaining to interstate commerce; federal legislation based upon the effect upon the national price of a commodity -- in fact the connection with any federal legislation based on the commerce clause. While the result of this state legislation would be to make a state offense of any act which the Federal Industrial Act has declared and the federal administrative agency has found to be an offense against interstate commerce, the state will not be in the position of ceding any of its legislative rights (as in prior State Recovery Acts) but will itself be defining the elements of and the contingencies for the offenses. (See State Statutes creating offense of counterfeiting federal coinage).

As to state aid to federal industrial legislation based upon any power other than interstate commerce, e. g., taxing, spending, war. post-roads and post-offices, et cetera, the method discussed above is feasible in some instances and not feasible in others. What is the most expedient method in each instance can be answered only upon the individual study of each proposed plan under each of the powers.

ENFORCEMENT STUDIES SECTION

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LEGAL STUDIES

ENFORCEMENT STUDIES SECTION

Foreword

The purposes of the Legal Enforcement Studies are:

(1) By a case review of certain selected cases under the National Industrial Recovery Administration to study and analyze the regulatory and administrative features set up within the Administration in connection with the enforcement provisions of the Act, including the penalty provisions and enforcement powers given to or assumed by administrative officers or agents independent of the courts; the enforcement powers given the courts; the rights and administrative remedies used in the administration and enforcement of the National Industrial Recovery Act; the rights and court remedies granted to those subject to the law; the administrative and enforcement machinery set up within the Administration to determine the legal, factual, mechanical and economic difficulties and problems, from an enforcement standpoint, which were encountered in attempting to enforce the National Industrial Recovery Act.

(2) To study and analyze other governmental agencies and bureaus having kindred regulatory powers with the view of contrasting their experiences and difficulties with that of the National Recovery Administration with respect to the particular matters set out in (1), supra, and in addition thereto to study and analyze the organic law creating the governmental bureau or agency; the history of the time indicating the demand or the necessity for the law; the evils sought to be remedied or the purpose to be accomplished by said law; the subject matter of the law (the persons, activities or things subject thereto); the constitutional provisions authorizing the enactment of the law; the remedies adopted by amendment or otherwise to meet the difficulties and problems encountered; amendments to the law made necessary for efficiency of administration or through failure of the original act to include powers necessary for efficient enforcement, or made necessary as a result of decisions by the courts, actions of the courts in the following particulars:

(a) Condemning the provisions of said law as authorizing constitutional provisions and how remedied;

(b) Sustaining the constitutional provisions thereof assailed in court;

(c) Condemning administrative action or methods of enforcement or administrative action as arbitrary and how remedied;

(d) Sustaining administrative methods assailed in court.

A very valuable part of this phase of the study relates to amendments to these various laws with the underlying reasons therefor. It will be noted that these amendments comprise not only omissions from the original acts but enlargements also, as well as those amendments which were passed to meet court objections as to the form or manner of the exercise of the powers provided.

(3) To study and analyze the legal, factual, mechanical and economic aspects of the use of devices and methods of enforcement other than those ordinarily used in the enforcement of regulatory laws such as the use of insignia, labels and liquidated damages, etc.

(4) To survey and analyze the laws of foreign countries relating to the regulation of business combinations and labor legislation which have been enacted by the various foreign countries in an effort to improve the industrial structure and the labor conditions of said countries, together with a study of the economic conditions which led to the enactment of such laws and the administrative and enforcement difficulties and problems which have been encountered in attempting to enforce said laws.

The further purposes of the studies in (2), (3) and (4), supra, are to weigh the experiences and difficulties of the other agencies in their operation under the enforcement devices and methods set out in the laws creating same and those of the foreign countries with a view of determining possible methods and means of enforcement which might be used effectively to enforce such legislation.

The usefulness of these studies is three-fold:

i. It will give a complete picture of the problems and difficulties encountered in the enforcement of the National Industrial Recovery Act in all its various phases;

ii. Since it is a disinterested study of the other governmental agencies and bureaus, it will point out the various weaknesses of the present means, methods and devices used in enforcing the Federal laws, together with suggested possibilities of improvement;

iii. It will contrast the means and methods of enforcement used in this country with those of foreign countries together with the resultant experiences of the use of same by the various countries. Further, these studies will serve as useful research material for Congress and state legislatures in the enactment of legislation in which it is desired to include the most effective methods of enforcement as the results will state concisely the "pros" and "cons" of the various enforcement devices and methods now in use in this country and in foreign countries.

ENFORCEMENT STUDIES SECTION

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ENFORCEMENT STUDIES SECTION

UNIT I - NRA EXPERIENCE

Foreword

This study is an analysis of the Enforcement Division files to ascertain some, if not all, of the difficulties and problems encountered in enforcing the Codes. There were two thousand and sixty-four (2,064) cases referred to the Enforcement Division and at the inception of this study it was intended to analyze each and every case in order to have a true picture of the many peculiar situations arising under a code system for industry. However, due to the voluminous amount of material to be read in connection with each case in order to compile the necessary data, it was realized that with the shortage of personnel and the limited period within which to complete the study that the plan would have to be somewhat modified. Therefore certain cases involving codes of the major industries were selected as typical cases and to date four hundred and eighty-eight (488) cases have been analyzed involving forty-five (45) codes.

In this study we have analyzed the regulatory and administrative features set up within the Administration in connection with the enforcement provisions of the Act, including the penalty provisions and enforcement powers given to or assumed by administrative officers or agents independent of the courts; the enforcement powers given the courts; the rights and administrative remedies used in the administration and enforcement of the National Industrial Recovery Act; the rights and court remedies granted to those subject to the law; the administrative and enforcement machinery set up within the Administration to determine the legal, factual, mechanical and economic difficulties and problems from an enforcement standpoint which were encountered in attempting to enforce the National Industrial Recovery Act.

ENFORCEMENT STUDIES SECTION

UNIT I - NRA EXPERIENCE

SUMMARY OF PRELIMINARY FINDINGS

At the outset enforcement of the National Industrial Recovery Act and the Codes was left to the Department of Justice. This did not prove satisfactory and subsequently an Enforcement Division was established within the National Recovery Administration to prepare the cases under the National Industrial Recovery Act and to assist the district attorneys in the prosecution of the same. Such an agreement was reached with the Department of Justice in March, 1934. However, by October, 1934, it had been nullified in practice as the Department of Justice failed to appoint National Recovery Administration attorneys in many instances as special assistants. This militated against effective enforcement because the district attorneys were swamped with routine matters and did not have adequate opportunity to familiarize themselves with the factual conditions surrounding this new and novel legislation so as to adequately present the cases to court.

As a result of a conference arranged at the request of the President in October, 1934, an Assistant Attorney General was appointed whose responsibility was effective enforcement of the National Industrial Recovery Act and the Codes. The appointment of said Assistant Attorney General did not relieve the situation as his duties were so interwined with departmental procedure that he could not effectively perform them.

The investigations conducted by the Federal Trade Commission were always thorough and competent. However, due to the time consumed in arranging for the appointment of an investigator and the necessity of returning to Washington to make the report a considerable amount of unnecessary time was consumed.

The case study of the files discloses that sixteen (16) of the forty-five (45) codes studied to date contained ambiguities which hindered effective enforcement.

Twenty-one (21) of the codes contained illegal delegations of authority to the code authority or delegations of authority which were so questionable that the enforcement officials were hesitant in bringing any action in cases where these provisions were involved.

The Act did not contain provisions authorizing the Administration to issue subpoenas or to swear witnesses. This left the Administration without effective means to establish the true facts in the case prior to attempts to prosecute in courts. In some instances the code authority held preliminary hearings prior to making recommendations to the National Recovery Administration. However, code authorities seemed to lack direction and proper advice as to the nature and sufficiency of the evidence required for the institution of court action.

The Compliance Division established within the National Recovery Administration was handicapped in the conduct of investigations because

in the main NRA investigators and adjusters were not trained men and did not fully appreciate the necessity of securing evidence in the proper form. As a result when the case was referred to the Enforcement Division no action could be brought thereon without a further investigation. The procedure established within the Compliance Division was not adaptable to thorough investigation of cases prior to reference to the Enforcement Division due mainly to the great number of cases which were referred to the Compliance Division.

During the year 1934 the average time consumed by the Compliance Division in attempting to effect compliance before the case was referred to the Enforcement Division was six and one-half ($6\frac{1}{2}$) months. In some instances the cases were not referred to the Enforcement Division for over a year. Consequently, when said cases were referred to the Enforcement Division the violations complained of had been committed so long in the past that for the purpose of court action the case was valueless and a new investigation had to be made to bring the file up to date.

Many of the respondents were small operators located in small towns and cities, were not engaged in interstate commerce, nor did their transactions have any direct effect upon interstate commerce. This proved to be an insurmountable obstacle as it was absolutely essential to show that the respondent was either engaged in interstate commerce or that his activities had a direct effect upon the same.

After the establishment of the regional offices in January, 1935, the average time consumed by the Compliance Division was reduced to three and one-half ($3\frac{1}{2}$) months.

As was pointed out above, at the outset the enforcement of the Act rested solely with the Department of Justice, and although, after the Enforcement Division of the National Recovery Administration was established, routines were set up for the handling of cases, these routines did not adequately meet the situation nor did they give the enforcement officials of NRA a clear prospective of the enforcement problems confronting them.

The state directors were authorized to refer cases directly to the district attorneys. This resulted in many cases being referred to the district attorneys who were not properly prepared and not being equipped to investigate and prepare said cases took no action thereon, with the result that two agencies often found themselves working at cross purposes.

The code authorities although cooperative in assisting NRA attorneys in developing the cases did not fully understand the legal problems involved and consequently were of little or no assistance.

In some instances the district attorneys were not in sympathy with the Act and did not cooperate with the NRA attorneys in attempting to enforce the Codes and the Act. In other instances district judges not in sympathy with the Act refused to entertain notions for restraining orders and preliminary injunctions. Said judges demanded the case be set down for hearing on its merits and as the court dockets were crowded

this resulted in an indefinite postponement of all action. Where the judges were known to be unfavorable in their attitude toward the National Recovery Act the Enforcement Division was loath to bring actions before said judges unless the case was unusually strong. This resulted in many cases being held up indefinitely.

In certain codes where the sweatshop conditions were prevalent the members of the industry resorted to all ingenious and unscrupulous means and methods known in order to frustrate the authorities in their attempts to enforce the codes.

The wage and hour provisions were the most often violated as 55% of the complaints involved wages, while 46% involved hours. In determining whether there was a violation of the wage and hour provision, difficulties were encountered where more than one code was involved as in some plants it was impossible to segregate the duties of the employees.

Violation of the trade practice provisions were involved relatively less than the wage and hour provisions - "sales below minimum price" being the trade practice provision most frequently violated.

The following is a summary of the court action taken by the Enforcement Division:

SUMMARY OF LITIGATION

Total Number of Cases Docketed		2,064
Criminal cases lost	9	
Criminal cases won	22	
Criminal cases Pending, Discontinued Moot or Settled	83	
Equity cases lost	26	
Equity cases won	234	
Equity cases Pending, Discontinued Moot or Settled	190	
Total number of cases litigated in Federal Courts	564	
Total number of cases before Federal Trade Commission	42	
Number of cases not litigated	1,458	
	2,064	2,064

ENFORCEMENT STUDIES SECTION

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NON-NRA EXPERIENCE

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ENFORCEMENT STUDIES SECTION

UNIT II - NON-NRA - EXPERIENCE

Foreword

The summaries of this study are an analyses of other governmental agencies and bureaus having kindred regulatory powers with those of the National Recovery Administration. In this Unit we have studied these agencies with the view of contrasting their experiences and difficulties with those of the National Recovery Administration with respect to the particular matters set out in the "Foreword" of Unit I, and in addition thereto to study and analyze the organic law creating the governmental bureau or agency; the history of the time indicating the demand or the necessity for the law; the evils sought to be remedied or the purpose to be accomplished by said law; the subject matter of the law (the persons, activities or things subject thereto); the constitutional provisions authorizing the enactment of the law; the remedies adopted by amendment or otherwise to meet the difficulties and problems encountered; amendments to the law made necessary for efficiency of administration or through failure of the original act to include powers necessary for efficient enforcement, or made necessary as a result of decisions by the courts, actions of the courts in the following particulars

(a) Condemning the provisions of said law as authorizing constitutional provisions and how remedied;

(b) Sustaining the constitutional provisions thereof assailed in court;

(c) Condemning administrative action or methods of enforcement or administrative action as arbitrary and how remedied;

(d) Sustaining administrative methods assailed in court.

A very valuable part of this phase of the study relates to amendments to these various laws with the underlying reasons therefor. It will be noted that these amendments comprise not only omissions from the original acts but enlargements also, as well as those amendments which were passed to meet court objections as to the form or manner of the exercise of the powers provided.

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ENFORCEMENT STUDIES SECTION

UNIT II - NON-NRA EXPERIENCE

Preliminary Summary of Findings

I. FEDERAL TRADE COMMISSION

A. HISTORY AND BACKGROUND OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission Act was enacted to supplement the Sherman-Anti-Trust law by the creation of a Commission to eliminate unfair methods of competition. In addition to the powers conferred by the Federal Trade Commission Act the Commission administers supplemental powers under the Clayton Act and the Webb Export Trade Act.

B. ENFORCEMENT POWERS OF THE FEDERAL TRADE COMMISSION

The enforcement provisions of the Federal Trade Commission Act whereby either party can appeal to the circuit courts of appeals to enforce, set aside, or modify the cease and desist orders of the Commission is a satisfactory way of enforcing and of obtaining judicial review of the Commission's orders.

C. EXISTING SUBSTANTIVE POWERS OF THE FEDERAL TRADE COMMISSION

In reviewing the decisions of the Commission the Courts have invariably confined the definition of "unfair methods of competition" to those methods in which there appear some element of fraud, misrepresentation or deceit.

By limiting its jurisdiction under the Federal Trade Commission Act to those practices which are fraudulent, false or misleading, the Commission has been stymied in any effort to raise the standards of industrial competition by prohibiting those methods of competition which a particular industry may consider unethical uneconomical or otherwise objectionable, or by encouraging methods which a particular industry may consider conducive to sound business.

Unethical, uneconomical or otherwise objectionable methods can be reached only when the practices are utilized in violation of the Sherman law or the Clayton Act.

The only way in which the Federal Trade Commission has been able to affirmatively promote fair trade practices has been through Trade Practice Conferences. The industries voluntarily draw up Agreements or Rules of Fair Trade Practices and the Federal Trade Commission approves the rules so drawn. These rules are classified by the Commission into Group I and Group II rules.

The Group I rules cover those trade practices which are unfair because fraudulent, false or misleading. They are enforceable by the Commission and the Courts because unfair per se.

The Group II rules constitute practices which are condemned by the industry because unethical, uneconomical, or otherwise objectionable; or, practices approved by the industry because conducive to sound business methods which the industry desires to encourage and promote. The Group II practices depend entirely on voluntary cooperation of industry members as they are not violative of existing law and can not be enforced by the Courts unless used in an illegal manner.

The efforts of the Federal Trade Commission to engender a higher norm of business ethics has been more or less futile because of (1) lack of any statutory basis for approving voluntary agreements and (2) lack of any power to enforce the practices approved under Group II rules.

D. STATUTORY POWER NECESSARY TO SUPPLEMENT PRESENT LEGISLATION

1. UNETHICAL AND UNECONOMICAL TRADE PRACTICES

There is need for the enactment of legislation to give the Federal Trade Commission power to determine that practices, although not proved to be fraudulent, false and misleading, are unfair practices because unethical, uneconomical or otherwise objectionable.

This power could be conferred by enlarging the provisions of Section 5 so as to empower the Commission to prohibit any trade practice that is unethical, uneconomical or otherwise objectionable. An increase in the power of the Federal Trade Commission was contemplated by the Senate Committee which considered the original Federal Trade Commission Act. It was stated that, "If conditions demonstrate and warrant, there will be a natural growth in the power of this body". The situation with respect to the Federal Trade Commission is analogous to the development of the Interstate Commerce Commission law. At first the Interstate Commerce Commission had the power only to declare that a rate was unfair. Later, under the Hepburn Amendment of 1906, explicit delegation of power to declare and fix a fair rate was conferred upon the Interstate Commerce Commission. Experience with NRA in raising the standards of industry demonstrate the wisdom and equity of having an administrative body which can declare and enforce fair standards.

This power can also be conferred by giving the Federal Trade Commission statutory authority to approve Agreements or Codes of Fair Trade Practices. The language of the statute should expressly include rules referred to above as "Group II" rules.

2. REGISTRATION OF INTERSTATE TRADE

The enactment of legislation requiring any person, partnership, corporation or association engaged in interstate commerce to register with the Federal Trade Commission would not be unreasonable. A precedent, by analogy, for such legislation exists in Section 5 of the Webb Export Trade Act which requires registration of all persons, etc. engaged in export trade.

3. EXEMPTION FROM ANTI-TRUST LAWS

The enactment of a provision modeled along the lines of the Anti-Trust exemption in Section 2 of the Webb Export Trade Act, would tend to eliminate any conflict or inconsistency between any fair trade rule approved by the Commission and the prohibitions of the Sherman and Clayton Acts. For instance, there is no statutory base for the Trade Practice Conferences so the Commission declines to approve rules which may be used to stabilize markets or prices (such as firm bidding, guaranteeing against price declines, anti-dumping, free samples, f.o.b. quotations and shipments) but if a provision such as Section 2 were included in the statute, the approval of such rules would be qualified consistently with the Anti-Trust Laws.

II. FEDERAL POWER COMMISSION

Licensees under the Act are subject to regulation in the resale power, where the same enters interstate commerce, or where they are engaged in intrastate business in a state having no regulatory agency. Such regulation is in the nature of a limitation where the original license is granted to the licensee.

Licensees are subject to the rules and regulations for the establishment of a system of accounts and for the maintenance of such system. The Commission is given the right to inspect and examine books and accounts and has the power to require licensees to report in full detail all information as to their financial set-up cost, methods of depreciation, etc.

The Act provides that false entries on the books or accounts of the licensees, or to make any false statement or report in response to a request or order from the Commission for statements on reports. It is submitted that such provision be considered in the drafting of any new legislation for the N.R.A.

The Commission is given the right to hold hearings and testimony to be taken by deposition, and to require by subpoena, the attendance and testimony of witnesses and the production of documentary evidence, and may invoke the aid of the United States District Courts in obtaining obedience to its subpoenas. This provision, with properly created machinery providing for hearings and the right of review thereof, are governed by the applicable provisions of the Interstate Commerce Commission Act, and might be incorporated in any legislation.

III. GRAIN FUTURES ACT

A. OBJECTS AND PURPOSES

The purpose of the Grain Futures Act is to prevent speculation or gambling in grain futures involving manipulation and sudden unreasonable fluctuation in prices. Trading in grain futures in interstate commerce is forbidden except under certain conditions.

B. PERSONS AND ACTIVITIES SUBJECT OF LAW NOT REGULATED

Cash transactions be owners or actual growers.

1. PERSONS AND ACTIVITIES SUBJECT OF LAW REGULATED

Grain future transaction - contracts to sell - neither buyer nor seller have actual ownership.

C. CONSTITUTIONAL BASIS FOR LAW

The Act is based on the power of Congress to regulate the mails and interstate commerce. The "mail" clause has not been passed on by the Courts. The "interstate" clause has been upheld by the Supreme Court on the theory that grain exchanges are a necessary local instrumentality required in the national distribution of grain.

D. REGULATORY PROVISIONS OF THE ACT

The regulatory feature of statute is the licensing (or designation) of any bureau or board of trade that meets requirements of the Act as a "contract market".

Any contract market violating the requirements or conditions of its license subjects itself to suspension or revocation of license.

Disciplinary action against individual traders is effected by withdrawal of license from contract market. Legislation has been suggested but never enacted to provide that cease or desist orders should issue against individuals and non-compliance with such order should subject market to penalty or fine.

E. INVESTIGATORY POWERS

The Secretary of Agriculture has broad powers of visitation and investigation. Business of contract market is clothed with public interest and inspection of books and records, even though no transgression of law is suspected, is not in violation of Fifth Amendment.

The Secretary is authorized to promulgate rules and regulations, including rules governing the filing of reports.

F. ENFORCEMENT AND PENALTIES

Regulation under Act is in effect permissive self-regulation of the business affected and enforcement comes through the Exchange itself.

If an individual trader or a contract market is believed to be violating the law the Secretary of Agriculture or the Attorney General may hold a hearing thereon. If either is found in violation an appeal may be taken to any United States Circuit Court of Appeals.

G. ADMINISTRATION

The principal function of Grain Futures Administration is to collect, collate and compile information from daily reports required to be filed by the rules and regulations of the Administration.

The Act regulates certain unfair trade practices, in addition to the manipulation of prices, attempted monopolies through corners, and the dissemination of false or misleading information concerning crop or market conditions.

The making of false reports, statements or records, and cheating or defrauding, are not prohibited by the Act. The Regulation of such practices has been left to the disciplinary action of the grain exchange.

H. CONCLUSIONS

Governmental supervision has aided the grain exchange in enforcing regulations for the better conduct of the grain business. This particular type of industrial regulation cannot be effected except in a similarly highly organized industry.

The compilation and publishing of detailed information concerning the operation of the grain exchanges has had a beneficial effect.

The Supreme Court, in upholding the law as constitutional, did not go so far as to hold that the Act regulated the daily affairs of grain traders. The opinion is confined to the operation of a national distribution system.

IV. INTERSTATE COMMERCE COMMISSION

The primary standards of regulation of carriers are that railroad rates shall be just and reasonable, non-discriminatory and non-prejudicial. Since these standards were found constitutional in the broadest sense by the Supreme Court it is suggested that any legislation might incorporate in substance these standards. The advantage of incorporating the standards already declared constitutional is obvious, and, furthermore, these standards have the advantage of appearing to be broad enough to broadly regulate wages, hours, production, prices, limitation of production or of machine hours, and to do anything generally with reference to trade and industry that is in or affecting interstate commerce.

It is suggested that legislation might employ appropriate words not only in the title thereof, but also in the body of the Act, in order that the Supreme Court could not fail to declare the new legislation remedial in nature, so that the same might be broadly construed and interpreted. Acts remedial in nature have received broader interpretation by the Supreme Court than other types of legislation.

Since the Elkins Act which made both parties to a violation subject to fine and imprisonment, enforcement by the Interstate Commerce Commission has been excellent. Similar enforcement provisions in legislation would prove to be an excellent deterrent to violation and very effective in securing compliance.

Creation of an administrative body exercising quasi legislative powers as well as quasi judicial powers is not repugnant to the Constitution of the United States and has been so adjudicated by the Supreme Court, and such powers may be combined in any new administrative organization.

The provision of the Act, Section 15, Paragraph 7, providing for the placing of the burden of proof on violators of the Act to establish their innocence before the Commission would appear to be most helpful in the enforcemont of legislation.

The provisions of the Interstate Commerce Commission Act in requiring registration of all carriers, pipe line companies, etc with the Interstate Commerce Commission might be emulated in any legislation for the registration of trade and industry.

V. PACKERS AND STOCKYARDS ACT

CONCLUSIONS

A. OBJECTS AND PURPOSES

The objective sought by the enactment of the Packers and Stockyards Act was the establishment of public supervision over the industry comparable to Federal supervision of railroads.

B. CONSTITUTIONAL BASIS FOR THE LAW

This Act is an exercise of the powers of Congress under the Commerce Clause. The stockyards are an interstate commerce agency associated with the interstate movement of the livestock and such business is within the power of national regulation.

C. PERSONS AND ACTIVITIES SUBJECT TO THE LAW

1. Packers.

2. Stockyards, market agencies, and dealers in such stockyards.

1. PROVISIONS RELATING TO PACKERS

Packers are defined by the Act as those dealing in interstate commerce who buy livestock for slaughter: manufacture meat products; manufacture non-edible livestock products under certain conditions; and, marketers of such products.

(a) Packers Activities Regulated

Those within the definition of packers automatically become subject to the Act.

The Act makes unlawful, unfair, unjust and discriminatory practices; preferential or prejudicial practices; pooling of supplies; manipulation of prices; apportionment of territory; and aiding or abetting any such Acts.

(b) Regulatory and Enforcement Provisions

(i) Requirement of Registration

Every packer is required to keep records to disclose all transactions, including true stock ownership. The Secretary of Agriculture is empowered to prescribe the form of keeping records. He may not examine records, however, unless he has reason to believe that the packer is violating the law.

(c) Power to Issue Cease and Desist Orders

The Secretary is empowered to issue cease and desist orders after holding a hearing and making findings of fact. The order is final unless packer appeals within thirty days to the Circuit Court of Appeals. If an appeal is taken the Secretary may ask that a temporary restraining order be entered pending final decision.

(d) Power to Require Reports

The Secretary is vested with the same power as is conferred upon the Federal Trade Commission to require the filing of reports, answers to questionaires, etc.

(e) Procedural Provisions

If a packer notes an appeal from a cease and desist order, it is suspended. The Secretary must file a transcript of the complete record in the Court which becomes the evidence in the case. New evidence may be taken. If the Court affirms, the decree operates as an injunction. If certiorari issues from the Supreme Court the injunction is not suspended unless it is specifically ordered.

2. PROVISIONS RELATING TO STOCKYARDS

The second part of the Act relates to stockyards, dealers and market agencies. Stockyards are defined as "public markets". The owner of a "private" market may be subject to the Act as a "packer" although not subject to the "stockyard" features of the Act.

(a) Activities Regulated

Stockyards are treated similar to railroads under the Interstate Commerce Commission Act.

Stockyard owners and market agencies must:

(i) Furnish reasonable services.

(ii) At just, reasonable, and non-discriminatory rates.

(iii) Establish and enforce reasonable regulation.

(iv) Keep accounts, records and memoranda.

(b) Regulatory and Enforcement Provisions

(i) Requirement of Registration

Stockyards are not subject to Act until notified by the Secretary. After public notice is given, the stockyard must register with the Secretary and post bond for faithful performance of obligations.

(ii) Rate Regulation

All stockyards and market agencies must publish rate schedule for services furnished. The power of supervision over rates is lodged in the Secretary. He has the power to determine whether any rate is unjust, unfair or discriminatory and he may prescribe the rate to be charged thereafter. The burden of proof is on the Secretary. It has been suggested that the Act be amended so as to conform to the Interstate Commerce Commission Act which specifically places the burden of proving the validity of any rate upon the carrier.

The Secretary is also empowered to prescribe the rate for stockyard services in intrastate transactions so as to remove any advantage, preference or discrimination against interstate commerce transactions.

A court can inquire only into whether the rate is fair, and that only as to (1) whether the statutory procedure was followed; and (2) if there was substantial evidence to support the findings.

(iii) Regulation of Unfair, Discriminatory or Deceptive Practices

The Secretary, upon complaint or own initative, after full hearing may issue cease and desist order against any practice made unlawful by the Act. The question as to what is an unfair trade practice is a question of law to be determined ultimately by the courts.

(iv) Power to Require Reports

Stockyard owners, market agencies and dealers as well as packers are required to keep accurate accounts, records, and memoranda. The Secretary can require written answers to questionnaires. Such reports are necessary to determine fair rates. It appears that the Secretary has full power to require any information that may be needed to administer the Act.

(v) Procedural Provisions

The statute is specific with respect to investigations and hearings concerning the regulation of rates. The statute does not set forth the kind of notice or hearings to be held in connection with unfair, discriminatory or deceptive practices. The Act imposes certain duties and creates certain private rights. Any aggrieved person may bring a direct civil suit in any District Court for damages or the Secretary may order reparation. The order of the Secretary may be enforced in the District Court.

D. ENFORCEMENT METHODS

The enforcement provisions with respect to the Packers are weak and differ from the enforcement provisions with respect to the control of stockyards, market agencies and dealers.

The Act provides for no enforcement by the Secretary of his orders against the packers except by way of criminal prosecution (sec. 195).

In the case of stockyards, market agencies and dealers, the Secretary or the Attorney General may apply to a District Court for enforcement of the order (Sec. 216), Failure to comply with an order of the Secretary also subjects the offender to criminal prosecution (Sec. 215).

The Secretary is given power to make rules and regulations to carry out the provisions of the Act but the statute provides no penalty for violation of any rule or regulation.

As a matter of fact the Secretary has found that trade practice complaints can be satisfactorily disposed of through cooperative efforts of the industry.

E. COMMENTS AND CONCLUSIONS

1. The Administrative Head of any body regulating industry

should have power similar to authority conferred by this Act to require reports, etc., concerning details of the activities to be regulated.

2. The investigatory authority should include power of inspection and visitation. The power of inspection should be limited to cases where there is a showing of probable cause.

3. The power of subpoenaing witnesses, necessary records, etc., should be included in the Act.

4. The hearings provided for in this Act are based on provisions of the Interstate Commerce Commission Act.

5. The Act should not only invest District Courts with jurisdiction to compel obedience to subpoenas but the failure to obey should be made a misdemeanor subject to a fine without the necessity of applying to a court for an order of obedience.

VI. RAILWAY LABOR ACTS

A. The various Railroad Labor Acts were administratively weak because

1. Boards were inadequate in number

2. Boards were unable to act on own initiative

3. Boards did not have adequate public representation

4. Too much reliance was placed upon disputants to compose their own differences.

5. Failure to provide sufficient neutral members on various boards led to hopeless deadlocks. (Questions involving wages and hours are in a sense questions involving class distinctions and interested parties can seldom agree. Settlements were seldom if ever satisfactory to both parties.)

B. COMPLIANCE DIFFICULTIES

1. Force of public opinion was relied upon to bring about compliance and even in a field such as this where the public was vitally interested this did not have the desired effect.

2. Boards and interested parties did not have power to enforce orders and awards.

3. Boards did not have power to subpoena witnesses or records or administer oaths.

4. None of provisions were penal.

In drafting any bills designed to regulate labor and competitive problems in industry, consideration should be given to the administrative defects and the compliance difficulties encountered as disclosed by a study of these acts.

Assuming that new legislation is to take the same or a similar form to the old National Industrial Recovery Act, the following provisions and enforceable regulations of the various railroads acts could, in my opinion, be adopted and used to good advantage:

1. Sections giving to interested parties right to file petitions in United States District Courts to enforce awards and orders of boards.

2. Sections giving boards right to file orders with United States District Courts.

3. Sections giving boards power to administer oaths and subpoena witnesses and records (through United States District Courts).

4. Regulations requiring carriers subject to hours of service act to submit monthly reports under oath showing persons worked more than number of hours permitted and reasons therefor.

5. Sections giving right to boards to delegate power to local boards.

Consideration should also be given to the need for adequate public representation on all administrative boards or tribunals as satisfactory rulings and compliance therewith is dependent in large part upon such adequate representation.

VII. RIVER AND HARBORS

The River and Harbors Act of September 19, 1890, under which the Secretary of War has issued rules, regulations and permits exercises general authority over the subject assumed.

Permits are granted for the establishment of harbor lines, preservation and protection of harbors, for the raising of sunken wrecks, wharves, dams and breakwaters.

The standard for the issuance of permits, in any given case, is that a structure or operation must not seriously interfere with navigation.

If it is desired to enroll industry and then license or issue permits, the River and Harbors Act affords a perfect precedent.

The thought of regimentation of industry to such measures and extent, in the writer's opinion, is suggestively impractical and little can be gained from this study of an affirmative help in drafting new legislation.

In connection with due process, however, it is thought that a study of the two leading cases, the Union and Monongahela Bridge cases, is peculiarly pertinent and helpful.

Under consideration of the contention of the Union Bridge Company and Monongahela Bridge cases, that the statute was unlawful as delegating complete legislative power to the Secretary of War as well as judicial power. In answer the United States Supreme Court in substance said:

> "That Congress cannot delegate to the President or any one else the power to make a law, as such delegation would be in contravention of the Constitution. But that Congress can make a law to delegate a power to some administrative officer or board to find a fact upon which the rule declared by Congress in the law, will operate."

The authority of these two cases, the Union and Monongahela Bridge cases, has been consistently followed by later cases, such as Southern Pacific vs. Olympic, 260 U. S. 205; Louisville Bridge vs. United States, 242 U. S. 409; United States vs. Norfolk, 29 Fed. (2d) 115; Angola vs. T. and P., 275 U. S. 534; Davis vs. Gulf, 31 Fed. (2d) 109.

The method of enforcement is interesting but it is thought that the study of the navigation laws of the United States will relate more specifically to this phase of suggestion.

The disclosure of the several cases, supra, in the report affirm the fact that when national interest and concern appears, the power of Congress is paramount, adequate and plenary to accomplish the national interest.

VIII. UNITED STATES SHIPPING BOARD

Inasmuch as the Shipping Act is quite similar in its general scope and purpose, as well as its terms, with the Interstate Commerce Commission Act, it is thought that the same conclusions made in respect of the Interstate Commerce Commission Act would apply to this study and should not be repeated again.

This study, however, has brought out the question of special contracts that were in existence prior to the enactment of the statute. The manner in which the statute has dealt with these special existing contracts is most helpful in drafting new legislation.

The Shipping Act provided that the special contract would continue to be valid and in full force and effect until the Board decided otherwise. It would seem therefore that in new legislation a clause might be incorporated similar to the clause in the Shipping Act, which has been referred to in the study; and to the effect that all special contracts concerning wages and hours, prices, discounts, shall be subject to be annulled or set aside by the Administration set up by the new legislation.

IX. UNITED STATES TARIFF COMMISSION

The United States Tariff Commission acts as an agent of Congress and is in the nature of a quasi-legislative body. While provision is made in the Tariff Act for hearings and review of the findings of the Commission, there appears to be very little in this Act which may be used to advantage in the preparation of any new legislation.

The courts have held that such hearings as are held by the Commission are legislative in nature and that a hearing is merely a privilege bestowed by the Act or Commission. It is to be noted that even where a hearing is not required as a matter of law under the procedure as provided for in this Act, both the Act and the Commission have in nearly all instances provided for such hearing, and a right to appeal, in certain instances, to the Court of Customs and Patent Appeals and in other instances to the Circuit Court of Appeals. Any hearings held by a proposed administrative body which would be in the nature of quasi-judicial or quasi-legislative nature, should make provisions for hearing, review or right to appeal.

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ENFORCEMENT STUDIES SECTION

UNIT III

EXTRA JUDICIAL METHODS OF ENFORCEMENT

Foreword

This study is an analysis of the legal, factual, mechanical and economic aspects of the use of devices and methods of enforcement other than those ordinarily used in the enforcement of regulatory laws such as the use of insignia, labels and liquidated damages.

I. THE USE OF LIQUIDATED DAMAGE PROVISIONS IN VOLUNTARY INDUSTRY AGREEMENTS

Preliminary Summary of Findings

An Agreement made in advance of a breach fixing the damages therefor is not enforceable as a contract and does not affect the damages recoverable for the breach, unless the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation.

In weighing the practices with respect to liquidated damages as employed in codes under the National Industrial Recovery Act against the principles enumerated, it is difficult to avoid concluding: in relation to code violations (a) that the amounts agreed upon and the administration of the same were literally penalties to enforce compliance; and (b) that under the doctrine that where a new duty is imposed by statute, if a remedy be given by the same statute for its non-performance, the remedy given is exclusive, no legal sanction for such a remedy, as the provisions generally employed in the codes, was permissible under the statute.

Liquidated damages as a means of "self-enforcement" in voluntary agreements can be introduced effectively by adequate provision in a statute pursuant to which authority exists for the making of such agreements.

II. GOVERNMENT SANCTIONED "BOYCOTTS" AND PUBLICITY DEVICES

The right of the Government to devise insignia indicating compliance with P.R.A. and to take measures to prevent the improper use of such insignia is beyond question.

The extent to which the Government may apply the economic pressure of boycott to secure voluntary compliance depends upon the ends sought to be obtained and the reasonableness of the means to attain those ends.

The right of Congress to require the use of labels as indicating compliance with a statute is not subject to serious doubt, provided Congress had the constitutional power to pass the statute in question and the label requirements are reasonable.

If it is contemplated that under legislation labels or insignia are to be used, provision therefor should be made in the Act.

Any statute establishing the voluntary or compulsory use of insignia or labels should make clear provision for the removal of insignia and label privileges under rules, regulations, and procedure in conformity with due process requirements.

III. THE IMPOSITION OF CONDITIONS UPON THE LETTING OF GOVERNMENT CONTRACTS

The imposition of conditions in the letting of Government contracts under Executive Orders 6246 and 6646 was an effective means of enforcing the provisions of the N. R. A. codes in certain industries.

The effectiveness of the Government Contracts Division was somewhat hampered by the lack of cooperation of other Government departments.

The imposition of conditions in the letting of Government contracts is sound in principle although, as a primary means of establishing wage and hour standards, it would be effective only in a limited field.

The imposition of conditions in the letting of Government contracts will be a valuable aid in enforcing any legislation designed to maintain wage and hour standards or any general plan to that end.

The Walsh Government Contracts Bill (S 3055) as passed by the Senate is generally satisfactory, but is susceptible to amendment contained in the report.

Under the authorities there is no doubt as to the right of the Government to prescribe the conditions upon which it will permit public work to be done on its behalf.

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ENFORCEMENT STUDIES SECTION

UNIT IV

FOREIGN STUDIES

Foreword

This study is a survey and analysis of the laws of foreign countries relating to the regulation of business combinations and labor legislation which have been enacted by the various foreign countries in an effort to improve the industrial structure and the labor conditions of said countries, together with a study of the economic conditions which led to the enactment of such laws and the administrative and enforcement difficulties and problems which have been encountered in attempting to enforce said laws.

I. FACTORY AND WORKSHOP ACTS OF ENGLAND

Summary of Preliminary Findings

Divergent philosophies of jurisprudence existing in the United States and England render the laws of England of little value as a guide to drafting new legislation.

Voluntary compliance with laws imposing no penalties failed in England and history indicates "that voluntary agreements in the United States will fail for the same reason that they failed in England, namely 'profit'".

Possible methods of administration under English system which could be adapted and which seem to be superior to those formerly used by the National Recovery Administration.

A. COMPARATIVE ANALYSIS OF THE FACTORY AND WORKSHOP LAWS OF ENGLAND

1. EMERGENCY

A comparison between the form of government of the United States, in the light of the Supreme Court Decisions, and the form of government existing in England, indicates that the possibility of help from the so-called "emergency powers" of the Federal Government cannot be utilized as it is in England.

2. REGULATION OF INTRASTATE ACTIVITIES

Congress may regulate only those things which directly affect commerce and under the decisions of the Supreme Court it is doubtful that hours and wages have any direct relation to interstate commerce. Acts of Congress are subject to judicial interpretation in respect of constitutional limitations, while the Acts of Parliament of England are not, because the powers of Parliament are not defined by law and it is bound by no charter or constitution. This fundamental difference between the governments of the United States and of England makes it difficult to

apply any of the provisions of the Factory and Workshop Acts of England to the present situation existing in the United States.

B. CLASSIFICATION AND DEFINITIONS

The Factory and Workshop Act of England was adopted in 1901, since which time there have been enactments of other laws relating to the subject and these Acts together are known as the Factory and Workshop Acts.

The Industries to which the Act applies are specified in each Act and the definitions of these industries are such that under the United States Supreme Court decisions they would be considered to be "intrastate activities" not directly effecting interstate commerce, and cannot be controlled by Federal statutes.

C. HEALTH AND SANITARY CONDITIONS

The subject matter covered by this part of the Factory and Workshop Acts of England is within the field of intrastate activities.

D. PROVISIONS AS TO MACHINERY AND ACCIDENTS

The subject matter covered by this section is also within the field of intrastate activities.

E. DANGEROUS AND UNHEALTHY INDUSTRIES

The subject matter of this section is wholly within the field of state legislation.

It is suggested that benefits may be derived by anyone in drafting future regulatory legislation in the United States by noting the manner in which the law is applied. The Act specifically sets out the objects to be accomplished and provides that "the Secretary of State may, by special order, apply the above provisions to any other disease occurring in a factory or workshop". Before the Secretary of State makes any regulations he must publish notices and objections may thereafter be filed. A hearing is thereupon had at which the questions in dispute may be ruled upon by the person appointed to hold the hearing, and a report must be made by him to the Secretary of State. Regulations made pursuant to this procedure must be laid before both houses of parliament and the same, or any number, may be annulled by either hours within forty days. Regulations apply only for the benefit of persons who are employed in the trade for which they are made.

F. CONDITIONS AS TO EMPLOYMENT AND REMUNERATION

This section, too, is within the field of state legislation as has been determined by the cases of Adkins vs. Children's Hospital, Child Income Tax Case, Hammer vs. Dagenhart.

G. ADMINISTRATION AND PENALTIES

This section contains many possible administrative and enforcement devices adaptable under our system of government.

H. SHOPS

This section resembles codes of fair competition adopted under the N. R. A. and applies to all classes of shops that the Secretary of State finds either desirable or necessary.

ENFORCEMENT STUDIES SECTION

DAVIS COMMITTEE REPORT

F O R E W O R D

This report represents the work and conclusions of an enforcement committee set up by the National Industrial Recovery Board to routinize and expedite the enforcement of NRA cases by United States Attorneys.

It analyzes all major codified industries and selects therefrom those provisions which were determined enforceable in accordance with a report and analysis or guide made by the chairman of the committee prior to the establishment of the committee proper. The provisions thus selected were ready for release to enforcement agencies and accompanying them this committee devised a standard form of investigator's report and a basic legal brief covering the wage and hour provisions in particular.

ENFORCEMENT STUDIES SECTION

DAVIS COMMITTEE REPORT

S U M M A R Y

1. The Committee for routinization of enforcement was established in the early part of February, 1935.

2. Its purpose was to simplify and routinize the enforcement of NRA code violations by United States attorneys, and to secure greater cooperation from the Federal Trade Commission in the handling of complaints peculiarly adapted for enforcement by "cease and desist" orders of the Commission.

An agreement was reached by the committee with the Commission whereby NRA code violations would be tried by the Commission within thirty days following the filing of a complaint by NRA.

3. The committee selected for study those industries deemed to be interstate in character, and as to which it could be plausibly argued that all their activities were so interstitially interwoven as to necessarily affect such commerce.

4. The selection of these industries was made by the committee in cooperation with and upon the advice of the Division of Research and Planning, the Labor Advisory Board, and the Deputy Administrators and Code Legal Advisers.

5. The code provisions were thereupon analyzed by the committee and only one "A" provisions from an enforcement standpoint were selected. These selections represented the unanimous views of the committee and the reasons therefor appear in the body of the report. As to all other provisions not selected for enforcement, recommendations were made to various coordinate branches of NRA to either revise poorly drawn provisions, or completely eliminate the unenforceable ones. Only those provisions which were believed to be sustainable by positive court rulings either in NRA cases or Federal Trade Practice cases were retained for immediate consideration.

6. To accompany these provisions which rendered themselves readily for enforcement, a standard form of investigator's report was prepared by the committee for use by field adjusters in order to enable them to adequately prepare cases and to gather the evidence necessarily required to establish a code violation and the jurisdictional effects of interstate commerce.

7. This standard form of investigators report covered only wage and hour violations because it was considered wise to test results this report would bring before standardizing the investigations of violations other than the wage and hour provisions.

8. A basic legal brief was drawn purporting to uphold the constitutionality of the wage and hour provisions. The release of enforceable wage and hour provisions, together with a standard form of report and basic legal brief were the primary accomplishments of the committee. These results up to the time of the Schechter case were merely ground plan to which additions were contemplated from time to time to cover trade practice violations and other codified industries until eventually all enforcement would be expeditiously handled.

LEGAL ASPECTS OF LABOR STUDIES *

FOREWORD

Perhaps the most sweeping changes engendered by the National Industrial Recovery Act occurred in the field of labor law. Prior to the Act, wage fixing by states under the police power for women in private industry had been declared unconstitutional by the United States Supreme Court. Wage fixing for men had not been attempted by the states.

State enactments of maximum hours were sustained by the courts only upon the basis of their direct relation to the health and safety of the people. Regulations of maximum hours were, therefore, enacted and sustained in only those occupations which were found by the legislators and the judges to be injurious to health or hazardous in nature. The regulations enacted in each state varied from those of every other state, and depended upon the degrees of recognition of legislators and judges of the economic and social desirability of legislation upon this subject. The same lack of uniformity in state legislation was evident in the regulation of child labor, the sweat shop and collective bargaining. State legislators recognizing the competitive advantages of less stringent regulation in these fields were loath to enact any but the most elastic laws.

The National Industrial Recovery Act not only authorized the fixing of maximum hours, the prohibition of child labor, the sweat shop and recognized collective bargaining, but it brought a degree of uniformity to the law which it hitherto lacked.

The Schechter decision raised the question of the degree to which it forced a return to the pre-N.I.R.A. labor law. In the consideration of this question there arose the subsidiary question as to the extent of the power of the state legislatures and the Congress of the United States to enact legislation in these fields. Implicit in this question is the extent to which neither the state legislatures nor the Congress have the power to regulate.

To answer these questions it was necessary to conduct a re-survey of regulation in these fields. The study of the legal aspects of labor problems was, therefore, undertaken with the stated purpose of delimiting the field within which the legislatures and the Congress have legislated on minimum wages, maximum hours, the sweat shop, child labor and the enforcement of collective bargaining agreements, of analyzing court decisions arising out of such legislation, evaluating the effects of such decisions to determine the extent to which such legislation has been rendered nugatory thereby, and of determining the extent to which court

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* NOTE: The detailed Tables of Contents and Summaries of Findings of the separate Legal Labor Studies are to be found in Part D, pages 408 - 556.

decisions have circumscribed the zone within which the legislatures and the Congress are empowered to legislate on these subjects.

The limitations of time and personnel permitted a study of only these, the most outstanding fields. An analysis of enactments and decisions covering public works and private industry is being undertaken, discussing the extent of the occupations and industries covered by such legislation, specific statutory reference to sex, the extent to which such legislation has been sustained or rejected, and the constitutional basis for such decisions.

LEGAL ASPECTS OF LABOR STUDIES

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THE EVIDENCE STUDIES SERIES

In the spring of 1935 the Research and Planning Division undertook to prepare for a selected list of industries a series of compilations of figures and descriptive text, which would be accessible N.R.A. legal representatives as evidence in pending court cases. After the suspension of the codes the project was completed in connection with the studies of the Division of Review and as convenient sources of information on the industries concerned.

These Evidence Studies were based on a uniform outline, and supply more or less the same information regarding the various industries, so far as data were available. The figures appear, in large part, in publications of other government agencies, but are here conveniently assembled with reference to specific industries.

The industries covered by the Evidence Studies account for well above one-half of the total volume of employment under codes.

The full list of the Evidence Studies is as follows:

1. Automobile Manufacturing
2. Boot and Shoe
3. Bottled Soft Drink
4. Builders' Supplies
5. Chemical Manufacturing
6. Cigar Mfg. Industry
7. Construction Industry
8. Cotton Garment
9. Dress Manufacturing
10. Electrical Contracting
11. Electrical Mfg. Industry
12. Fabricated Metal Products
13. Fishery Industry
14. Furniture Mfg.
15. General Contractors
16. Graphic Arts
17. Gray Iron Foundry
18. Hosiery
19. Infants' and Children's Wear
20. Iron and Steel Industry
21. Leather
22. Lumber and Timber Products
23. Mason Contractors
24. Men's Clothing Industry
25. Motion Picture
26. Motor Bus Mfg. Industry (DROPPED)
27. Needlework Industry of Puerto Rico
28. Painting and Paperhanging
29. Photo Engraving Industry
30. Plumbing Contracting
31. Retail Food (SEE NO. 42)
32. Retail Lumber
33. Retail Solid Fuel (DROPPED)
34. Retail Trade
35. Rubber Mfg.
36. Rubber Tire Mfg.
37. Silk Textile
38. Structural Clay Products
39. Throwing
40. Trucking
41. Waste Materials
42. Wholesale & Retail Food (SEE NO. 31)
43. Wholesale Fresh Fruit and Vegetable
44. Wool Textile Industry

In addition to the studies brought to completion, certain materials have been assembled for other industries. These MATERIALS are included in the series, as follows:

45. Automotive Parts & Equipment
46. Baking Industry
47. Canning Industry
48. Coat and Suit
49. Household Goods and Storage, etc. (DROPPED)
50. Motor Vehicle Retailing Trade
51. Retail Tire and Battery Trade
52. Shipbuilding
53. Wholesaling or Distributing Trade (DROPPED)

THE STATISTICAL MATERIALS SERIES

The Statistics Section, in supplying the requirements of individual study units, collected a considerable amount of statistical material for a selected list of industries. These have been numbered to correspond with the codes of the industries concerned. Detailed and specialized data not likely to be of general interest have been excluded.

The materials include data on establishments, firms, employment, payrolls, wages, hours, production, capacities, shipments, sales, consumption, stocks, prices, material costs, failures, exports and imports. They also include notes on the principal qualifications that should be observed in using the data, the technical methods employed, and the applicability of the material to the study of the industries concerned.

The following are the industries for which the Statistical Materials included in this Series have thus far been issued.

Cleaning and Dyeing Trade (No. 101)
Copper and Brass Mill Products (No. 81)
Cotton Textiles (No. 1)
Electrical Manufacturing (No. 4)
Fertilizer Industry (No. 67)
Funeral Supply (No. 90)
Ice Industry (No. 43)
Knitted Outerwear (No. 164)
Paint, Varnish and Lacquer Mfg. Ind. (No. 71)
Rayon and Synthetic Yarn Producing Ind. (No. 14)

THE WORK MATERIALS SERIES

As the work of the Division of Review has developed, a number of preliminary and special studies and compilations of data have been made available to the staff, under the name of Work Materials. They were circulated as materials for internal use.

The following is a full list of the items thus far issued in this Series of Work Materials.

1. Anti-Trust Laws and Unfair Competition
2. Summary of Analysis of Trade Practice Provisions
3. in N.R.A. Codes
3-11 (Price Studies prepared under the Committee on Price Policy)
12. List of Statistical Tables on Labor Provisions in the Codes
13. Classification of Approved Codes in Industry Groups
14. Cases on Intrastate Activities Which So Affect Interstate Commerce as to Bring Them Under the Commerce Clause
15. Production, Prices, Employment and Payrolls in Industry, Agriculture and Railway Transportation, January, 1923, to Date
16. Resale Price Maintenance Legislation in the United States
17. Tentative Outlines and Summaries of Studies in Process
18. Contents of Code Histories
19. History of the Review Division, February 8, 1934, to June 16, 1935
20. Policy Statements Concerning Code Provisions and Related Subjects
21. The Possibility of Variation in Tariff Rates to Secure Proper Standards of Wages and Hours
22. Industrial Homework
23. The Right of Individual Employees to Enforce Provisions of Collective Bargaining Agreements
24. The Treaty Making Power of the United States
25. Federal Regulation Throu h the Joint Employment of the Power of Taxation and the Spending Power
27. Extra Judicial Methods of Enforcement

CONSOLIDATED FILES

The Files for the Following Industries have been consolidated and are available in the Central Records Section.

Advertising Metal Sign and Display
Advertising Specialty Mfg.
Agricultural and Dairy Machinery
Agricultural Insecticide and Fungicide
Air Filter
Air Transport
Air-applied Concrete Contracting
Aircraft Mfg.
All Metal Insect Screen
Aluminum Cooking Utensils
Animal Soft Hair
Architectural Ornamental Iron, etc.
Art Needlework
Artistic Lighting
Athletic Goods Mfg.
Auger Bit and Tool
Auto Hot Water Heater
Automotive Rebuilding and Refinishing
Automotive Bumper Mfg.
Automotive Pressed Metal
Automotive Shop Equipment

Bakery Equipment
Batting and Padding
Beater and Jordan and Allied Products
Bedding Mfg.
Beer Equipment
Beverage Dispensing Equipment
Bias Tape
Bird Cages and Stands
Bituminous Coal
Bituminous Road Material Distributing
Blue Print and Photo Print
Boot and Shoe
Brake Beam
Brass Forging
Bright Wire Goods
Broom Mfg.
Buff and Polishing Wheel

Can Mfg.
Canning Industry
Carbon Dioxide
Carburetor Mfg.
Card Clothing
Cast Iron Boiler and Cast Iron Radiator
Cast Iron Pressure Pipe
Caster and Floor Truck Mfg.
Chain Mfg.
Chemical Mfg.

Chilled Car Wheel
Cinders, Ashes and Scavenger
Coal Cutting Machine
Coal Dock
Coal Mine Loading Machine
Coated Abrasives
Commercial Aviation
Commercial Vehicle Body
Complete Wire and Iron Fence
Concrete Mixer
Construction
Conveyor and Material Preparation
Cooking and Heating Appliance Mfg.
Corn Cob Pipe
Corset and Brassiere
Corset Steel
Cosmetic Container
Cotton Converting
Cotton Garment
Cotton Textile
Cut Tack, Wire Tack and Small Staple
Cutlery, Manicure Implement, Painters & Paperhangers Tool Mfg.

Dairy Equipment
Diamond Core Drill
Die Casting
Diesel Engine Mfg.
Display Equipment
Domestic Freight Forwarding
Drapery and Carpet Hardware
Dredge and Floating Plant
Drop Forging

Electric and Neon Sign
Electric Industrial Truck Mfg.
Electric Lighting and Reflecting Devices Mfg.
Electric Overhead Crane
Electric Plating - Metal Polishing & Rust Proofing
Electro Plating
Envelope
Envelope Machinery
Extended Surface Industry

Fabricated Metal Products
File Mfg.
Fireplace Furnishings
Flexible Insulation
Flexible Metal Hose and Tubing
Fly Swatter
Food and Meat Chopper
Food Service Equipment
Forged Tool Mfg.
Foundries and Machine Shops
Foundry Supply
Fountain Pen and Mechanical Pencil

Funeral Vehicle and Ambulance

Galvanized Ware
Gas Powered Industrial Truck
Gas Tubing Mfgrs.
Gasket Mfg.
Gold Leaf Mfgrs.
Greenhouse Mfg.
Greenhouses (Operators)

Hack Saw Blade Mfg.
Hair and Jute Felt
Hair Clipper and Allied Products
Hand Bag Frame
Hand Chain Hoist Mfg.
Hand Lawn Mower
Hardware - Hardware Builders
" - Hinges, etc.
" - Reversible Window
" - Store Fixtures
Heating Supplies - Radiator Enclosures
Hog Ring and Ringer
Hoist Builders
Hoisting Engine
House Furniture - Thermos Bottles
Household Goods Storage and Moving Trade
Household Ice Refrigeration
Hydraulic Hoist, Dump Bodies and Cargo Mfg.
Hydraulic Machinery

Industrial Alcohol
Industrial Wire Cloth
Insect Wire Screen Cloth
Insecticide and Disenfectant
Internal Combustion Engine
Iron and Steel
Iron and Steel Products - Lead Head Nails
Iron and Steel - Metal Industries
" " " - Metal Products
" " " - Sheet and Coil
" " " - Store Front Mfgrs.

Jack Mfg.
Job Galvanizing

Kiln, Cooler and Drier

Ladies Handbag
Land Development and Home Building
Leaf Spring Mfg.
Lift Truck and Portable Elevator
Lightning Rod
Lock and Builders Hardware
Locomotive Appliance
Locomotive Mfg.
Luggage and Fancy Leather Goods

Machine Screw Mfg.
Machinists and Machine Shops - Metal Spinners
Marking Devices
Mechanical Lubricators
Mechanical Press Mfg.
Men's Clothing
Metal Compartment
Metal Decorating
Metal Hospital Furniture
Metal Jacketed Jugs
Metal Lathe
Metal Partitions - Metal Doors
" " - Steel Window Guard
Metal Roof Deck
Metal Safety Tread
Metal Specialties - Fire Slide
" " - Mail Boxes
Metal Spinning and Stamping
Metal Stamping - Perforated Metal
Metal Tank
Metal Treating
Metal Window
Metallic Display Rack
Metallic Wall Structure
Milk and Ice Cream Can
Mill Supplies
Millinery and Dress Trimming Braid and Textile
Mine Car Mfg.
Mine Tool
Motion Picture
Motor Vehicle Retailing
Motorcycle Mfg.
Multiple V-Belt Drive

Natural Organic Products
Non-Ferrous Hot Water Tank Mfg.
Non-Ferrous Foundry
Notions - Hairpins
" - Hook and Eye Tape
Nottingham Lace Curtain

Office Equipment
Oil Filter Mfg.
Oil Spray Mfg.
Open Steel Flooring

Paper and Pulp
Paper Bag Mfg.
Perforating Mfg.
Photographic and Photofinishing
Pipe and Pipe Fittings - Coil Mfg.
" " " " - Steel Pipe
Pipe Tool
Piston Ring Mfg.
Plain Washer

Playground and Pool Apparatus
Porcelain Breakfast Furniture
Porcelain Enameling
Portrait Painting
Powdered Metal Bearing
Power Transmission
Precious Jewelry Producing
Printing Equipment
Prison Equipment
Public Seating
Pulp and Paper Machinery
" " " Mill Wire Cloth
Pulverizing Machinery and Equipment

Radiator Mfg.
Railway and Industrial Spring
Railway Appliance Mfg.
Railway Brake Beam
Railway Car Building
Railway Hand Brake
Raw Peanut Milling
Ready Cut House
Reclaimed Rubber Mfg.
Reduction Machinery
Replacement Axle Shaft
Replacement Piston Mfg.
Replacement Valves and Valve Parts
Restaurant and Hotel Supplies
Rock and Ore Crusher
Roller and Silent Chain
Rolling Steel Door
Roofing Granule
Roofing Materials - Metal Shingles

Safety Razor and Safety Razor Blade Mfg.
Saw Mill Machinery
Scale and Balance
Screw Machine Products
Sheet Metal Contractors
" " - Fabrication of Sheet Metal Products
Shoe Shank Mfg.
Shower Curtain
Silk Textile
Silverware Mfg.
Siphon Industry
Small Locomotive
Snap Fastener Mfg.
Socket Screw Products Mfg.
Solder Fittings
Spark Plug Mfg.
Specialty Accounting Supply
Spring Mfg.
Sprocket Chain Mfg.
Steam Engine
Steel Barrels - Ash Cans
" " - Metal Containers

Steel Package Mfg.
Steel Tire Mfg.
Steel Tubing
Sterilizers
Stoker Machinery Mfg.
Surgical Dressing

Tackle Block Mfg.
Taxicab
Textile Machinery
Toll Bridge
Traffic Control
Trailer Mfg.
Transit Industry
Trucks
Tubular Split and Outside Pronged Rivet Mfg.

Upholstery Spring and Accessory
Upward Acting Door
Used Textile Machinery and Distributing

Valve and Valve Fittings Mfg.
Vise Mfg.
Vitreous Enameled Ware

Wadding
Warm Air Furnace Mfg.
Warm Air Furnace Pipe and Fittings
Washing and Ironing Machine Mfg.
Washing Machine Parts Mfg.
Watch Case Mfg.
Water Softener and Filter
Weather Strip
Welt Mfg.
Wheel and Rim Mfg.
Wheelbarrows
Wholesale Automotive Trade
Wire Goods - Hangers, Clothing
" " - Wire Frames
" " - Wrought Wire
Wire Machinery
Wire Reinforcement
Wire Screens - Fly Screens - Weather Strip
Wood Screw Mfg.
Wood Working Machinery
Wool Textile
Wrench Mfg.

CODE HISTORIES

The Code Histories are documented accounts of the formation and administration of the codes. They contain: the definition of the industry and the principal products thereof; the classes of members in the industry; the history of code formation including an account of the sponsoring organizations, the conferences, negotiations and hearings which were held, and the activities in connection with obtaining approval of the code; the history of the administration of the code, covering the organization and operations of the code authority, the difficulties encountered in administration, the extent of compliance or non-compliance, and the general success or lack of success of the code; and an analysis of the operation of code provisions dealing with wages, hours, trade practices, and other provisions. These and other matters are canvassed not only in terms of the materials to be found in the files, but also in terms of the experiences of the deputies and others concerned with code formation and administration.

The following Code Histories have been completed and are filed in the Central Records Section:

Name of Code

1. Abrasive Grain
2. Agricultural Insecticide & Fungicide
3. Air Applied Concrete
4. Air Transport
5. Air Valve
6. All Metal Insect Screen
7. Alloys Industry
8. Aluminum Industry
9. American Match Industry
10. Animal Soft Hair
11. Anti-Hog Cholera Serum, etc.
12. Art Needlework
13. Asphalt & Mastic Tile
14. Asphalt Shingle & Roofing
15. Assembled Watch
16. Athletic Goods Mfg.
17. Atlantic Mackerel Fishing
18. Auction & Loose Leaf Tobacco Warehousing
19. Auto Hot Water Heater Mfg.
20. Automobile Manufacturing
21. Automotive Parts & Equipment Mfg.
22. Ball Clay Production
23. Bank & Security Vault Mfg.
24. Batting & Padding
25. Beauty & Barber Distributing
26. Beet Sugar Industry
27. Bias Tape Industry
28. Bicycle Manufacturing
29. Bituminous Coal
30. Blackboard & Blackboard Erasers Mfg.
31. Blouse & Skirt Mfg.
32. Blue Crab Industry
33. Book Publishing Industry
34. Bottled Soft Drink Industry
35. Bowling & Billiard Equipment
36. Brattice Cloth Mfg.
37. Brewing Industry
38. Buff & Polishing Wheel
39. Builders Supplies
40. Building Granite
41. Bulk Drinking Straw, etc.
42. Bituminous Road Material Dist. Ind.
43. California Sardine Proc.
44. Candy Mfg.
45. Can Manufacturing
46. Canning Industry
47. Canvas Stitched Belt Mfg.
48. Cap & Closure
49. Cap Screw Mfg.
50. Card Clothing Industry

Name of Code (Cont'd)

51. Carpet & Rug Mfg. Industry
52. Caster & Floor Truck Mfg.
53. Cast Iron Boiler & Radiator
54. Cement Industry
55. Chain Mfg.
56. Charcoal & Package Fuel
57. Cigar Container Industry
58. Cigarettes, Snuff, Chewing & Smoking Tobacco
59. Cigar Mfg.
60. Cinders, Ashes & Scavenger Trade
61. Clock Mfg. Industry
62. Coat & Suit
63. Cocoa & Chocolate Mfg. Ind.
64. Coin Operated Mach. Mfg. Ind.
65. Collapsible Tube Ind.
66. Commercial Aviation
67. Commercial Breeder & Hatchery
68. Commercial Fixture Ind.
69. Commercial Stationery, etc.
70. Complete Wire & Iron Fence
71. Concrete Pipe Mfg. Ind.
72. Construction Mach. Dist.
73. Cooking & Heating Appl. Mfg.
74. Copper & Brass Mill Prod. Dec
75. Copper, Brass, Bronze, etc.
76. Copper Industry
77. Cork Insulation Contractors
78. Corn Cob Pipe Industry
79. Corset & Brassiere Ind.
80. Cosmetic Container
81. Cotton Pickery
82. Country Grain Elevator
83. Crushed Stone, Sand, Gravel, etc.
84. Curled Hair Mfg. Ind.
85. Cutlery & Manicure, etc.
86. Dental Goods & Equipment, etc.
87. Diesel Engine Mfg.
88. Distilled Spirits Ind.
89. Dog Food Industry
90. Domestic Freight Forwarding
91. Dowel Pin Manufacturing
92. Drapery & Upholstery Trimming
93. Dress Manufacturing
94. Dry Goods Cotton Batting
95. Earthenware Mfg. Ind.
96. Electric Industrial Truck
97. Electrical Wholesale Trade
98. Electrotype & Stereotype
99. Elevator Mfg.
100. Excelsior & Excelsior Products
101. Farm Equipment Industry
102. Feed Manufacturing
103. Feldspar Industry
104. Fire Extinguishing Appliance
105. Fibre Wall Board Industry
106. Fisheries Industry
107. Fishing Tackle Industry
108. Flexible Metal Hose
109. Folding Paper Box Industry
110. Fuller's Earth Prod. & Marketing
111. Gas Appliances & Apparatus
112. Grain Exchanges & Members
113. Graphic Arts in Hawaii
114. Grinding Wheel Industry
115. Gypsum Industry
116. Hair & Jute Felt Industry
117. Hand Chain Hoist
118. Handkerchief Industry
119. Heating Piping & Air Condit.
120. Hog Ring & Ringer Mfg.
121. Hosiery Industry
122. Hotel Industry
123. Household Goods Stor. & Moving
124. Industrial Safety Equip.
125. Industrial Supplies & Mach. Dist.
126. Ingot Brass & Bronze
127. Inland Water Carrier Trade, etc.
128. Insulation Contractors

Name of Code (Cont'd)

129. Lace Mfg. Industry
130. Ladder Mfg. Industry
131. Licorice Industry
132. Lift Truck & Portable Elevator
133. Lime Industry
134. Linseed Oil Mfg. Industry
135. Liquefied Gas
136. Liquid Fuel Appliance
137. Live Poultry in New York City
138. Luggage & Fancy Leather Goods
139. Lumber & Timber Products
140. Macaroni Industry
141. Machine Tool & Equip. Dist. Trade
142. Machine Tool & Forging Mch.
143. Machined Waste Mfg.
144. Malt Industry
145. Mason Contracting Industry
146. Merchandise Warehousing Trade
147. Merchant & Custom Tailoring
148. Metal Tank Industry
149. Mica Industry
150. Milk Filtering Materials, etc.
151. Milk & Ice Cream Can Mfg.
152. Millinery & Dress Trimming, etc.
153. Motor Bus Industry
154. Motor Fire Apparatus Mfg.
155. Motor Vehicle Maintenance
156. Motor Vehicle Retailing
157. Music Publishing
158. Narrow Fabrics
159. Natural Cleft Stone
160. Natural Organic Products
161. Newspaper Printing Press
162. Northwest, Alaska Fish, Prep. & Wholesaling
163. Office Equipment Mfg.
164. Ornamental Moulding, Carving, etc.
165. Package & Processed Cheese
166. Package Medicine Industry
167. Paint, Varnish & Lacquer Mfg.
168. Paper Distributing Trade
169. Paper Makers Felt
170. Paper Making Mach. Builders
171. Perforating Mfg.
172. Photo-Engraving Industry
173. Photographic & Photo Finishing
174. Photographic Mfg.
175. Picture Mould & Picture Frame
176. Pipe Nipple Mfg.
177. Plastering & Lathing
178. Plumbago Crucible Ind.
179. Plumbing Contracting
180. Plumbing Fixtures
181. Pottery Supplies & Backwall, etc.
182. Powder Puff Ind.
183. Preformed Plastic products
184. Pretzel Industry
185. Prison Equipment Mfg.
186. Private Home Study School
187. Pulverizing Mach. & Equipment
188. Railway Safety Appliance Ind.
189. Raw Peanut Milling
190. Rayon & Silk Dyeing & Printing
191. Rayon & Synthetic Yarn
192. Ready-Mixed Concrete
193. Reclaimed Rubber Mfg.
194. Refrigerating Machinery
195. Replacement Axle Shaft Mfg.
196. Restaurant Industry
197. Retail Farm Equipment
198. Retail Food & Grocery
199. Retail Jewelry
200. Retail Lumber, Lumber Prod., etc.
201. Retail Meat Trade
202. Retail Kosher Meat
203. Retail Monument Industry
204. Retail Solid Fuel
205. Retail Trade
206. Retail Trade in Hawaii
207. Rock & Ore Crusher
208. Rock & Slag Wool Mfg.
209. Rock Crusher Mfg.
210. Rubber Tire Mfg.

Name of Code (Cont'd)

211. Safety Razor & Blade, etc.
212. Sand Stone Ind.
213. School Supplies & Equipment
214. Scientific Apparatus
215. Scrap-Iron, Non-Ferrous Metals, etc.
216. Screw Machine Prod.
217. Secondary Aluminum Industry
218. Seed Trade
219. Sheet Metal Distributing
220. Shoe Last
221. Shoe Form
222. Shoulder Pad Mfg.
223. Shovel, Dragline & Crane
224. Silk Textile
225. Slate Industry
226. Small Locomotive Mfg.
227. Smoking Pipe Mfg. Industry
228. Soft Lime Rock
229. Solid Braided Cord
230. Southern Rice Milling
231. Spray Painting & Finishing Equip.
232. Stained & Leaded Glass
233. Steam Heating Equip. Ind.
234. Steel Plate Fabricating Ind.
235. Stone Setting Contracting
236. Structural Clay Products
237. Sulphonated Oil Mfg.
238. Surgical Dressing
239. Talc & Soapstone
240. Tank Car Service
241. Tapioca Dry Products
242. Textile Machinery Mfg.
243. Throwing Industry
244. Tile Contractors
245. Toll Bridge
246. Toy & Playthings
247. Transit Industry
248. Trucking Industry
249. Undergarment & Negligee
250. Upholstery & Decorative Fabrics
251. Upholstery & Drapery Textile
252. Used Machinery & Equip. Dist.
253. Used Textile Bag
254. Used Textile Mach. & Access. Dist.
255. Valve & Fittings Mfg.
256. Velvet Industry
257. Venetian Blind
258. Wadding Industry
259. Warm Air Furnace
260. Washing & Ironing Mach. Mfg.
261. Washing Machine Parts Mfg.
262. Waste Paper Trade
263. Watch Case Mfg.
264. Welt Mfg.
265. Wheat Flour Milling
266. Wholesale Automotive Trade
267. Wholesale Coal
268. Wholesale Confectioners'
269. Wholesale Dry Goods
270. Wholesale Fresh Fruit & Vegetable
271. Wholesale Fresh Fruit & Veg.
272. Wholesale Hardware
273. Wholesale Jewelry
274. Wholesale Millinery
275. Wholesale Monumental Granite
276. Wholesale or Distrib. Trade
277. Wholesale Paint, Varnish, etc.
278. Wholesale Plumbing Prod.
279. Wholesale Stationery
280. Wholesale Tobacco Trade
281. Wholesale Wallpaper
282. Wire, Rod and Tube Die
283. Wooden Insulator Pin & Bracket
284. Wood Heel Industry
285. Wood Preserving Industry
286. Wood Turning & Shaping
287. Wool Trade
288. Woven Wood Fabric Shade

The following Division Histories have been completed and filed in Central Records Section:

1. Area Agreement - Construction Division
2. Insignia Section
3. Distributing Trade
4. Air Applied Contracting Division of Construction
5. Correspondence Division
6. General N.R.A. Code Authority

MISCELLANEOUS STUDIES

LEGISLATIVE POSSIBILITIES IN STATE CONSTITUTIONS

The State Relations Division is preparing "A Treatise on Legislative Possibilities under each of the State Constitutions". The purpose of this work is to show the degreee of cooperation that each State could give to Federal legislation requiring State cooperation. The following fields are covered:

1. Delegation of Legislative Authority
2. Legislation by Reference
3. Due Process
4. Impairment of Right of Contract
5. Police Power

The method being used is to quote or cite each case decided in the various States under each of the above headings. In this manner some indication is secured of the weight of authority to be given each.

CODE ADMINISTRATIVE PROVISIONS

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      (b) Example of a Typical Small Code-Industry
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CODE ADMINISTRATIVE PROVISIONS

Preliminary Summary of Findings

This study is primarily a summary of code administrative provisions. To the tables and digests of code rules it adds only such facts and comment as are needed to explain their significance. It deliberately avoids the history of the administration of code provisions and any conclusions as to future legislation.

The Code Authority System

From the standpoint of Code Authority administration one-quarter, roughly, of all industry was organized under 20 to 30 unitary codes with only one Code Authority. Half of all industry, employing 10 to 12 million workers, was loosely organized into 30 to 40 huge federations, composed of 5,000 local Code Authorities and over 1,000 State, regional, product and commodity divisions. The remaining quarter hardly deserved to be described as organized, since it was split into 500 small industries, of which a majority had less than 5,000 workers each.

Good or bad administration in one of the giant code industries affected more workers than were employed in ten or a hundred of the dwarfs.

The Powers and Duties of Code Authorities

Code Authorities actually exercised less power than the early codes prescribe, because of the checks imposed by N.R.A. policies. These policies developed in the direction of increasing N.R.A. supervision, as shown by the mild provisions of later codes.

Code Authority discretion in minor matters might, however, be considerable in the aggregate. Code Authorities exercised great influence through their recommendations. They could neglect to take action on unpopular rules, and they could adjust the details of many institutions to suit their own convenience. Examples are the appointment of their own employees or those of trade associations as "confidential agents," and the postponement of reports required by the codes on controversial subjects.

The Methods of Selection of Code Authorities

Practically all methods of selecting Code Authorities gave a majority of seats to trade association members. Sixty percent of all codes did this expressly. Fourteen per cent of the 35 largest codes, which covered half of all industry, and 34 per cent of all codes and divisions, prescribed general elections; but these were so restricted, by limiting suffrage to assenters, by weighted voting, and by seats granted ex-officio to association officers, that the large association members probably got majorities in such elections. Appointment by divisional Code Authorities had the same result.

Representation, then, must largely be judged by the presence or absence of minority members. N.R.A. accepted this principle and insisted

on non-associational minorities in 17 per cent of the 35 largest codes and 37 per cent of all codes and divisions. Representation of geographical and functional minorities was regularly demanded and arranged by the sponsoring associations. Representation of extra-industry interests - that is, of consumers and of other industries - was negligible. Labor representatives were authorized in 42 codes, 25 of which were in the apparel industries.

Definition and Classification of Industry

Any division of industry into groups is artificial, because the whole constitutes a single web of related processes. Paper descriptions of industry have compensated for this by making several groupings - one, say, of factories grouped according to their products, and another based on the states in which they are located. Trade associations met the issue by allowing voluntary and overlapping membership.

N.R.A. started with trade association definitions, but found them inconsistent with its own fundamental principle that the boundaries of Code Authority jurisdictions must not overlap. When one industry was defined to cover all cigar containers, and another to cover all paper boxes, it was impossible to escape a conflict of jurisdiction with respect to paper boxes used to contain cigars. Logic was no help where premises were inconsistent. N.R.A. could only placate the rival Code Authorities by compromise, and plan to review fundamental premises and principles. This course was pursued by the N.R.A. Classification Section, as exemplified by its routine of decisions on specific cases, and by its elaborate charts, which classified all industries into a rational hierarchy of related groups.

EMPLOYMENT, PAYROLLS, HOURS, AND WAGES in 115 SELECTED CODE INDUSTRIES, 1933-1935

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EMPLOYMENT, PAYROLLS, HOURS, AND WAGES IN 115 SELECTED CODE INDUSTRIES, 1933-1935

Summary of Preliminary Findings

The report is primarily a tabular and graphic presentation of the movements in certain labor series in 115 Code industries for which material could be obtained from the existing Bureau of Labor Statistics data. The series covered are employment, payrolls, total man-hours, average weekly wages, average hourly wages and average hours worked per week.

The material indicates that while there was considerable variation from industry to industry, the typical behavior of average hours and average hourly wages between May or June and August or September 1933 was the "Scissors Movement," average hours declining sharply and average hourly wages increasing sharply. During this same period it may be said that generally employment and payrolls increased sharply. To what extent the latter phenomena may be attributed to NRA Codes is, of course, problematical.

During the period following the Schechter decision, hourly wages do not appear to have changed significantly except for a few industries. Average hours, however, seem to have increased in a number of industries, although in relatively few cases are such increases marked.

THE PRA CENSUS OF EMPLOYMENT, JUNE, OCTOBER, 1933

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THE PRA CENSUS OF EMPLOYMENT, JUNE, OCTOBER, 1933

Summary of Findings

This study is an analysis of the returns of the PRA "post card" census covering about 75% of the industrial employment for the weeks of June 17 and October 14, 1933. The returns for 643,000 establishments were analyzed showing an increase of 15.6% in employment and 18.5% in payrolls. These values are checked quite well by the corresponding indications of the BLS sample and the regular 1933 Census, by states and by industry groups.

The non-manufacturing industries covered 86% of the establishments, 51% of the employment and 55% of the payrolls. For the manufacturing industries the coverage is, establishments 14%, employment 48%, payrolls 43%. The increase in employment between June and October was 12.7% in non-manufacturing and 18.6% in manufacturing industries. The corresponding changes in payroll were 15.3% and 22.4%. The changes by states and regions, and for individual industries, show significant variations from these averages.

For three states, an analysis of these changes was made by size of establishment. The variations of employment and payroll with size of concern were found to be similar in form to those shown by the 1929, 1933 Census data for these states.

THE MIGRATION OF INDUSTRY: THE SHIFT OF TWENTY-FIVE NEEDLE TRADES FROM NEW YORK STATE, 1926 TO 1934

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THE MIGRATION OF INDUSTRY: THE SHIFT OF TWENTY-FIVE NEEDLE TRADES FROM NEW YORK STATE, 1926 TO 1934

Summary of Preliminary Findings

The study, which was undertaken in an attempt to prove or disapprove the complaints of members of industry that the NRA was causing migration from New York State, presents data and evidence which proves that a migration of industry did take place in New York, but that the movement was both into and out of the State. The study is based on basic material and statistics collected from many sources. The statistics come, in the main from Census data, published and unpublished, and from a report, on "Industrial Development in the United States and Canada" published co-operatively by the National Electric Light Association and the Metropolitan Life Insurance Company. Other material and data are chosen from the many books, articles, papers, reports and transcripts that were studied.

From these readings and from conversations with government officials, it has been noticed that a considerable division of thought exists on the subject of whether any significant migration has occurred. At present, definite conclusions have not yet been reached, but the evidence collected with probably tend to show that for the period covered the emigration has slightly exceeded the immigration in New York. Even this preliminary conclusion must be qualified somewhat because the study, at present, only touches slightly upon the NRA and post-NRA periods.

A continuance of the research and collection of material of more recent date might lead to different conclusions. Material covering these later periods are available in the various Code Authority studies and also in recent articles and papers. A bibliography of the latter is available.

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AN ANALYSIS OF THE OCCUPATIONAL HISTORIES OF 75,000 AUTOMOBILE WORKERS IN MICHIGAN, APRIL 1930 TO JANUARY, 1935

Summary of Preliminary Findings

From the original schedules of the Michigan Unemployment Census 75,000 persons were selected covering males and females who had been employed at some time during the period April 1, 1930 to January 14, 1935 in an automobile, automobile body, or automobile parts plant for a period of one month or more. Information on the occupational histories of these persons during the period from April 1930 to January 1935 has been tabulated to throw light on the following questions:

1. Is age a basis for discrimination in automobile employment?
2. From what locations and occupations does the automobile industry recruit its workers?
3. What was the extent of the shift of automobile workers from automobile to non-automobile work in each of the years 1931 to 1934?

The results indicate that discrimination on the basis of age does exist to a substantial degree. There is some indication, although no positive proof, that the discrimination has decreased in intensity between 1930 and 1934. In general, the material indicates that approximately 5 per cent of the new workers came from outside Michigan in 1932, 1933, and 1934. The tabulation of data pertaining to the third question has not been completed.